216 - 25988

THE CENTRAL BREWING COMPANY,
a corporation,
Appellant,

vs.

THE COLUMBIA MALTING COMPANY,
a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

220 I.A. 633

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a nil capiat judgment entered against it upon the verdict of a jury.

The contracts involved in this suit are three in number, viz:

1. Contract dated September 13, 1917, for 25,000 bushels of New Standard Malt at $1.51 a bushel, f. o. b. New York City, to be shipped by November 1, 1917.

2. Contract dated September 15, 1917, for 25,000 bushels of Coast Malt at $1.53 a bushel, f. o. b. New York City, to be shipped in gradual monthly shipments during the ensuing two months.

3. Contract dated October 5, 1917, for 20,000 bushels of California Barley Malt at $13 a bushel, f. o. b. New York City, in gradual monthly shipments during the next three to four months and to follow present unfilled contracts.

The terms on all the contracts were net cash thirty days after delivery.

The whole dispute is resolved into the proposition - did plaintiff so breach the contracts by failing to pay for the malt delivered according to the terms of the contracts as to relieve defendant from the obligation to further carry them out on its part

No. 25955

THE CENTRAL BREWING COMPANY,
a corporation,
Appellant,

vs.

THE COLUMBIA RAILING COMPANY,
a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

220 I.A. 633

HON. THEODORE DUETTER HOLDOM
PRESIDING.

DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a nil dicit judgment entered against it upon the verdict of a jury.

The contracts involved in this suit are three in number, viz:

1. Contract dated December 12, 1917, for 25,000 bushels of new standard malt at $1.1 a bushel, f. o. b. New York City, to be shipped by November 1, 1917.

2. Contract dated December 19, 1917, for 25,000 bushels of toasted malt at $1.55 a bushel, f. o. b. New York City, to be shipped in gradual monthly shipments during the ensuing two months.

3. Contract dated October 9, 1917, for 20,000 bushels of California barley malt at $1.5 a bushel, f. o. b. New York City, in gradual monthly shipments during the next three to four months and to follow previously filled contracts.

The terms on all the contracts were net cash thirty days after delivery.

The whole dispute is reduced to the proposition - did plaintiff so breach the contracts by failing to pay for the malt delivered according to the terms of the contracts as to relieve defendant from the obligation to further continue out on its part

and make the deliveries called for by plaintiff which it refused to make on the ground of such breach? If it did, then the question arises - did defendant by its actions waive the necessity of payments according to the contract terms?

That plaintiff did breach the terms of the contract by failing to pay for deliveries of malt as provided by the contracts is not seriously disputed, but plaintiff in this regard rests its right to recover on the contention that defendant by its conduct waived its right to demand payment promptly at the times designated by the contracts.

The defense interposed was that plaintiff failed to make payments at the times designated in the contracts, and on its part defendant denied that it had in any manner waived the necessity of plaintiff's paying at the times provided for in the contracts, and alleged that it had not assented to plaintiff's failure to promptly pay.

No question is raised as to the correctness of the instructions given to the jury or the rulings of the court upon the evidence. The contract was admittedly controlled by the New York Uniform Sales Act. However, the particular section relied upon is substantially the same as a like statute in Illinois.

An examination of the evidence predisposes us to the opinion that the jury might reasonable find from such evidence that plaintiff defaulted in its contract payments; that such default justified defendant in not proceeding further as requested, and that defendant had not by its conduct waived plaintiff's default.

It is clear that plaintiff was derelict in more ways than one in its performance of the things required of it by the contracts. It was required among other things to give

and make the deliveries called for by plaintiff which it refused to make on the ground of such breach? If it did, then the question arises - did defendant by its actions waive the necessity of payments according to the contract terms?

Thus plaintiff did breach the terms of the contract by failing to pay for delivery of milk as provided by the contract is not seriously disputed, but plaintiff in this regard voids its right to recover on the contention that defendant by its conduct waived its right to demand payment promptly at the times designated by the contracts.

The defense interposed was that plaintiff failed to make payments at the times designated in the contracts, and on its part defendant denied that it had in any manner waived the necessity of plaintiff's paying at the times provided for in the contracts, and alleged that it had not assented to plaintiff's failure to promptly pay.

No question is raised as to the correctness of the instructions given to the jury or the ruling of the court upon the evidence. The contract was admittedly controlled by the New York uniform sales act. However, the particular section relied upon is substantially the same as a like statute in Illinois.

An examination of the evidence preliminary to an opinion that the jury might reasonable find from such evidence that plaintiff defaulted in its contract payments; that such default justified defendant in not proceeding further as required, and that defendant had not by its conduct waived plaintiff's default.

It is clear that plaintiff was derelict in more ways than one in its performance of the things required of it by the contracts. It was required among other things to give

shipping directions. This it at one time failed to do for more than two months, and when remonstrated with regarding such omission and urged to send along shipping directions it failed to respond to such urging for about a month. Likewise plaintiff was continually behindhand in its payments for malt delivered under the contracts. At one time it represented, as an excuse for not paying promptly, that there was a brewers' strike, which representation turned out to be, from the testimony of one of plaintiff's own witnesses, without foundation.

October 10, 1917, plaintiff owed defendant $50,870.31 under its contracts for malt delivered, and admitting its inability to pay proffered $17,500 on account and notes for $7,000 each, which would still leave a balance of $10,000 unpaid. On this reduction of the indebtedness defendant accepted an order for an additional 20,000 bushels of malt. December 3, 1917, defendant sent plaintiff a statement showing that it was in arrears in the payment of $42,819.53, as well as $14,000 of notes, making an entire indebtedness at that time of $56,819.53. On that date defendant wrote plaintiff urging settlement and asking for $15,000 on account. Not hearing from plaintiff defendant December 15, 1917, telegraphed plaintiff that its September and October bills were overdue and that it must have a remittance or be compelled to draw at sight early the next week, and requesting an answer. Receiving no answer, defendant December 17, 1917, wired plaintiff, "Will draw tomorrow at sight for Fifteen Thousand. Kindly Honor and oblige." On the last mentioned date defendant wrote plaintiff protesting against conditions, saying, "It is imperative that we should have these funds on all our due and overdue accounts and sincerely trust that there will be no question about your honoring drafts." Plaintiff on the next day caused the following telegram to be sent: "Wire received. Central cannot pay in two weekly

installments, but will pay balance in four or five weeks, and this is the best they can do on account of the strike. Do not ship any more until this is settled." The strike referred to was the false alarm above mentioned. Defendant answered this telegram by wire, in which it said:

> "As the account stands today, including the five cars still in transit the Central owes us about fifty-six thousand dollars and this must be reduced as it is entirely too high. We are willing to give them the line of credit agreed upon in our contract, but we certainly are not willing to double it up, and we do not think that they should expect anything more than their contract calls for, especially in such times as these. They must use what credit they have to borrow money to pay our bills when due if necessary."

Plaintiff thereupon promised to pay the amount due within four or five weeks, but failed, and instead on January 30, 1918, remitted $4,950.69, with a letter in which among other things it made the following excuse: "We also had to redeem $98,000 of our ten-year mortgage bonds that had matured, the owners of same being scared by the possibility of prohibition and requested payment for same. Under these conditions we have to ask your indulgence and promise to try and pay you for two cars every two weeks until the account is cleared up, if you insist upon cash settlement."

Defendant answered plaintiff, saying inter alia, "This is positively and wholly unsatisfactory, and we insist upon immediate payment of balance now so long overdue." This remained unanswered until the 9th of February, when a check was sent for $7,359.90. Defendant in acknowledging this check said, "We must, as we said before, insist upon this account being closed in the not distant future." February 16th plaintiff paid the last of its bills and then demanded the shipment of the balance of its order. In the meantime the salt had advanced to two dollars a bushel.

It is patent from the foregoing recitations that defendant constantly complained of plaintiff's tardiness in making prompt payments and frequently urged plaintiff to live up to its contracts in this regard. Certainly it cannot be conceded that these actions on the part of defendant constitute a waiver of its rights to payments as called for by the contracts. Plaintiff had flagrantly breached the contracts and was in default in making payments in accord with them during most of the time covered by such contracts. Defendant was therefore warranted in treating the contracts as forfeited for continued breaches by plaintiff in failing to pay promptly as provided by the terms of the contracts. It is clear to us that the breaches of plaintiff were so material as to justify defendant in abandoning the further performance of the contracts on its part. In Chicago Washed Coal Co. v. Whitsett, 278 Ill. 623, the court said:

> "It was incumbent upon appellant to show payment for the coal previously delivered or an offer to do so."

So, in this case, the onus was on plaintiff to show, in order to entitle it to have its order for the remaining undelivered malt filled, that it had paid for the previous deliveries according to the terms of the contract. As said in McAnsh v. Moore, 178 Ill. App. 562, "Hence before plaintiff was entitled to recover it should have shown performance of its obligation under the contract." Hess v. Lawson, 149 Ill. 138; National Machine Co. v. Standard, 181 Mass. 275.

The breaches of the contracts by plaintiff in its failing to make payments anywhere near the time provided by the contracts were not technical breaches of the contracts, but were flagrant and inexcusable and were neither condoned nor waived.

The contracts between the parties - five in number - constituted a series, and upon the trial were each treated as

parts of one continuous contract. This was evidently the theory of plaintiff. No instructions were requested on the theory that the five contracts were each separate and distinct from the other. In a measure the contracts were by their terms interlaced with each other and were so treated by the parties both before and at the trial. That which was not challenged in the trial court is not subject to primary challenge in this court.

No valid reason appearing why the judgment of the Municipal court should be reversed, it is affirmed.

AFFIRMED.

Dever and McSurely, JJ., concur.

300 - 26072.

JOHN L. HALL,
Appellee,

vs.

HIRAM W. HELOW,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

220 I.A. 633

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for $1455.60 on the verdict of a jury instructed by the court, and defendant appeals.

The action is upon a contract for the sale by plaintiff to defendant of certain hard maple "now on sticks at Steger, Illinois, approximating as per estimate 225,000 feet more or less." The price was then set out and it was agreed that delivery was to be f. o. b. cars Chicago, terms cash less two per cent within fifteen days from date of shipment. The lumber was to be inspected by a National Hardwood Lumber Association inspector, each party to pay one-half of the inspection charges.

The suit is to recover for 7,200 feet of 12/4" 1st and 2nds Dry Hard Maple and 15,087 feet 12/4" No. 1 Common Dry Hard Maple, which according to the contract price was $1470.30, adding thereto the sum of $15.30 charges incurred by plaintiff for extra expense beyond ordinary sorting, which defendant by his contract agreed to pay, makes the amount of the judgment. For failure to pay this sum according to the terms of the contract plaintiff insisted that defendant had by such conduct breached the contract and on July 2, 1918,

cancelled the same.

The dispute is not as to the correctness of the price charged for the lumber or that it is not the price named in the contract, but defendant contends that plaintiff wrongfully cancelled the contract and that he likewise wrongfully sold to third parties a portion of the lumber at Steger purchased by him, that he breached the contract in failing to make certain deliveries thereunder as ordered; and also counterclaimed, by a plea of set-off, for damages by reason, as he claims, that the lumber delivered was of a grade inferior to that provided for in the contract.

Defendant makes the further defense that the amount sued for was not due because of a custom, which he insists prevailed in the hard maple lumber business in Chicago, to the effect that where the same is sold for cash with provisions for a discount for payment within a stated time, then if the discount was not availed of by such custom the bill was not due until sixty days from the date of shipment.

Defendant also argues for reversal the rulings of the court excluding evidence regarding an alleged custom of the trade that where a discount is not availed of, the bill is due net in sixty days, and in instructing a verdict for plaintiff.

Plaintiff cancelled the contract by letter of July 2, 1918, and places the right to cancel upon two grounds - non-payment of bill for shipment of June 11, 1918, and failure to furnish shipping instructions to meet contract, which was for immediate shipment, defendant to furnish shipping orders promptly.

Defendant endeavored to prove among other things conversations between the parties regarding the transaction culminating in the contract in suit prior to its date and execution,

and offered correspondence between the parties regarding deliveries subsequent to the cancellation of the contract; also evidence as to a claimed custom in the trade regarding payment of accounts where the discount privilege is not availed of, also evidence to prove that lumber contracted for could not be obtained elsewhere in this market and the amount of damage sustained by defendant for the non-delivery of the undelivered part of the lumber called for by the contract. These were clearly inadmissible, and the rulings of the court excluding them were without error.

The terms of the written contract could not be changed or modified by any prior verbal understanding. If there were any such the law presumes that they were merged in the written contract afterwards entered into. If the contract was legally cancelled it could not be revived except by the mutual agreement of the parties to it. That was said thereafter regarding the right to cancel the contract is of no avail if the cancellation was lawful, and the subsequent giving by defendant of orders for more lumber in no way operated to revive the cancelled contract.

As to the matter of damages for non-delivery of the undelivered portion of the contract lumber, the contract being effectually cancelled was immaterial. Evidence of a custom, if there was any, regarding the time of payment of invoices where the same were not paid within the discount period is of no importance and inadmissible where there is no ambiguity in the contract relative thereto. We hold that in the contract in suit there is no ambiguity permitting of extraneous evidence to aid its interpretation. Its meaning is sufficiently plain so

that the court may construe it from within its four corners.

It is clear that defendant breached the contract in failing to pay the invoice in suit within the fifteen days from date of shipment. He availed of the discount in paying the first two bills, and the one in suit, the third, he failed to pay within the time specified in the contract. This breached it. He again breached it by failing to give orders for shipment as in the contract provided. This also embarrassed plaintiff and prevented him from loading the lumber on cars which he had in readiness to load for immediate shipment as the contract required.

McFarland v. Savannah River Sales Co., 247 Fed. 652, is as near on the facts and the law to the instant case as could well be found in the reports. None of the cases cited by defendant and none within our knowledge holds to a contrary rule. The contract in the McFarland case supra regarding payment was "cash less 2 per cent. 30 days from date of shipment," and it was contended this did not require defendant to pay within thirty days from date of shipment; that the contract was therefore silent as to time of payment and consequently such time is what the law makes it, viz., a reasonable time after shipment. The court met these contentions by saying;

> "We think the terms of payment are in no degree ambiguous. They mean what they say - cash in 30 days with 2 per cent. discount. Failure to pay within 30 days was a breach. Time ordinarily being of the essence of merchants' contracts, there was here a breach justifying rescission."

To pursue this subject further would be labor misspent.

When defendant failed to pay within the contract time plaintiff had the right to do as he did - cancel the contract. For such breach plaintiff was excused from further performance

and defendant's rights thereunder after cancellation were lost, including the right of set-off or recoupment.

Defendant failed to prove any defense to the action, recognized as such in law, or to disprove the case made by plaintiff. In this situation it was proper for the court to give effect to plaintiff's motion for an instructed verdict.

There is no reversible error in this record, and the judgment of the Superior Court must be and therefore is affirmed.

AFFIRMED.

Dever and McCurdy, JJ., concur.

136 - 25257

WILLIAM A. LEWIS,
Defendant in Error,

vs.

FRANK J. BILEK,
Plaintiff in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

220 I.A. 633

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

William A. Lewis on the 25th day of August, 1916, filed a bill in the Superior court of Cook County, in which he averred that he was a member and duly authorized agent of the International Allied Printing Trades Association of Indianapolis, Indiana, hereinafter called the Association, a voluntary, unincorporated association or union of workingmen; that he filed the bill on behalf of the association and all of its members against Frank J. Bilek as provided by Illinois statutes.

The bill prayed for an injunction restraining Bilek from further using or displaying the union label of the Association or of the Chicago Allied Printing Trades Council, hereinafter called the Council, without a license so to do, and that the defendant be required to deliver up union labels in his possession and to account for profits and gains while wrongfully using the same, etc. The bill charges that the Association is made up of many thousands of practical workingmen and women who are members of one or more of the following named international unions: The International Typographical Union; The International Printing Pressman and Assistants Union; The International Brotherhood of Book Binders; The International Stereotypers and Electrotypers Union; that said membership consisted of over 125,000 members and that "it is impossible to

make each and all of such members parties to this bill of complaint; that the Association adopted a union label to be used on all printed matter produced by its members, which label was registered with the Secretary of the State of Illinois; that the union label is of great value to the members of said Association in that it has been the means of advertising the products of their labor and has been instrumental in increasing their opportunities for employment because of the demand for articles bearing the label; that the Council was granted by the Association the sole and exclusive authority to loan or lease the union label in the City of Chicago subject to the rules and by-laws of the Association and of the Council; that the Council is also a voluntary, unincorporated association subordinate to the Association; that complainant is secretary of the Council; that on July 22nd 1913, the Council, under its authority, granted to Bilek the right to use the union label. Material parts of the contract under which Bilek was granted the right to use the union label are as follows:

> "Said party party (Bilek) further agrees that all printed matter by said first party contracted for, given out to be done, purchased, or otherwise produced by or for said first party in the conduct of its said business, shall be produced by parties operating under a similar agreement and the labor thereon performed by members of the Trade Unions affiliated with party of the second part as aforesaid, and that such matter may have the imprint of the aforesaid label on any or each piece thereof, together with the number of said label thereon, immediately above, below, or at either end of the imprint of said label unless otherwise authorized by the said party of the second part. Failure by aforesaid party of the first part, his agents or employes in the use of said label to apply said identification number, or the use of worn, defaced labels incapable of giving a clear and sharp imprint of either label or number, shall constitute sufficient reasons for immediate termination of this agreement by said second party and the right to use said label by said first party, without further action or notice."
>
> "Fourth. Party of the first part hereby further covenants and agrees with party of the second part to conform to and abide by the rules, regulations and conditions adopted by the said party of the second part for the use of said label by said first party, which is hereby made a part of the consideration for this agreement and license. Said rules, regulations and conditions are made a part hereof."

It was an earnestly contested question of fact both before the master to whom the case had been referred, and, on exceptions to his report, before the chancellor, whether Bilek had violated the agreement under which he obtained the right to use the union label, and, also, whether he had received requisite notice of a hearing held before a committee of the Council which met to determine the question whether he, Bilek, had violated the terms of his agreement. Bilek, referred to in the contract as the party of the first part, undertook to comply with all the rules of the association governing the issuance of the label. The rules and regulations provided in part as follows:

> "Section 12. Labels shall not be used in any office other than the one named in the agreement. And in every instance must be capable of giving clean and sharp impression easily readable, badly worn labels not to be used under any circumstances; violation of this section to constitute sufficient cause for immediate revocation of said label privileges."
>
> "Section 13. Whenever the label is used the number of the label must also appear."

The contract contains the following paragraph:

> "Failure by aforesaid party of the first part, his agent or employees in the use of said label to apply identification number, or the use of worn, defaced labels incapable of giving a clear or sharp imprint of either label or number, shall constitute sufficient reasons for immediate termination of this agreement by said second party, and the rights to use said label by said first party (meaning the said defendant) without further action or notice."

It will be noted that the above paragraph of the contract provides that failure on the part of Bilek or his agent or employes to use a sharp imprint of either the label or number constituted grounds for the immediate termination of the agreement without further action or notice to him. This is a material part of the agreement, which Bilek assented to.

The evidence introduced at the hearing tends to show that the defendant was engaged doing a small printing business under the name of Illinois post card Company, and that

the charter of this company had been revoked. Rudolph Kraus testified that he held a one thousand dollar interest in the business; that he was an officer of what he thought was a corporation; that he had attended a meeting of its stockholders or directors; that so far as he knew the corporation was not in existence at the time of the hearing; that "since November, 1913, since the time I started there it was always Frank J. Bilek;" that he, witness, collected money due Bilek and that bills were always rendered in Bilek's name. The facts leading up to the revocation of Bilek's right to use the label are briefly as follows: One Blaha became a candidate for Business Agent of Franklin Union No. 4, a subordinate union of the Council, against one Crambert and one Russ. In attempting to further his candidacy Blaha had printed at Bilek's printing shop circulars which tended to attack the integrity of Crambert as a member of Franklin Union No. 4 and of the Council. The circulars were printed in part at Bilek's place of business with the knowledge and consent of Kraus. Part of the circular was set up by Kraus; the balance seems to have been set up in another office. When distributed, however, the circulars bore the union label, the right to the use of which had been extended to Bilek.

There is some dispute in the evidence as to what extent, if at all, the number 182 given with the label was blurred or changed at the time the circulars were printed. Kraus testified that the number 182, which under the contract Bilek had a right to use, was distinctly shown in the printed matter when it left Bilek's place of business. Other evidence satisfactorily discloses, however, that the circulars when distributed bore the number 181, which was a number given by contract to another establishment. These circulars were distributed just before the election was held for the office for which Blaha was a candidate.

On April 12, 1916, Bilek's license or right to use the label was revoked for the reason, as alleged, that he had violated the terms of his contract and the rules and regulations of the Association and Council in permitting the improper use of the label as indicated. The label committee of the Council, which was authorized to and did determine the question of whether Bilek had violated his contract, held a meeting April 12, 1916; on the preceding day Kraus was notified by telephone that a complaint of the wrongful use by Bilek of the label would be heard by the Council on the following day. Kraus was notified to be present at the meeting and to notify Bilek. Kraus notified Bilek's wife of the hearing. Bilek did not appear at the hearing, but Kraus did and made an explanation of the circumstances attending the printing of the circulars. The evidence shows that Bilek was called on the telephone on the day of the hearing and that Mrs. Bilek, who answered the telephone call, said that he was asleep and that she did not wish to awaken him. After the revocation of the license the complainant notified Bilek of what had been done and Bilek stated he would appear before the label committee on April 19, 1916, and protest against its action. At a meeting of the Committee held April 18, 1916, Bilek did not appear and complainant made a report to the committee that he had notified Bilek of the action of the committee. April 20th the action of the committee was submitted to a meeting of the Council; it was unanimously concurred in and the complainant and attorney of the Council were instructed to use any means within the law to secure the labels. A decree was entered in the cause on the 25th day of February, 1918, and on the following day an injunction was issued as prayed in the bill. An appeal prayed from this decree and order was never perfected and about two years after the entry of the decree the defendant seeks its reversal by writ of error.

It is said that complainant had no right to file the suit in his own name. The suit was brought by complainant on behalf of the Association and all of its members. Chapter 140 of Hurd's Ill. Rev. Stat., 1915-1916, provides a penalty for the counterfeiting or unlawful use of labels, trade marks, etc. Section 4 of this chapter provides for a remedy by injunction against persons unlawfully using, displaying or manufacturing without authority such labels, trade marks, etc., and the last sentence of section 5 of the act provides that, "In all cases where such association or union is not incorporated, suits under this act may be commenced and prosecuted by any officer or member of such association or union on behalf of, and for the use of, such association or union." It is evident that the suit was brought under the act to protect the rights of the Association and the Council and their members. The Council directed that the matter of the enforcement of the rules and regulations of the Council and of the Association and the rights under the contract be left in the hands of the Secretary, the complainant, and the Council's attorney, and they were authorized to use any means within the law to secure the labels. We think the record shows that under the statutes the complainant had a right to appear as complainant in the cause for himself and for all other persons associated in the unincorporated organizations of workingmen; that the statute was intended to provide for cases such as the present case, and that the complainant was legally authorized to begin the suit in his own name. We have been unable to find a case dealing with the precise question. This, however, seems to have been accepted as the law in Job Printers Union of Chicago v. Linsley, 107 Ill. App. 654. Further, as touching on the authority of complainant to bring the suit, the evidence shows that the Association gave express authority to the Council or to some member thereof

to begin the action. It is true that complainant as secretary had no express authority to bring the action. He appears to have been charged with the custody of the labels and was required to perform such other work as the Council might direct.

We do not believe, as urged, that the complainant had an adequate remedy at law. Bilek refused to give up the labels on demand. There was no reason to believe that a demand by the sheriff on a replevin writ would be more effective. In addition tomthis the bill prayed for an accounting against him for the wrongful use of the labels, and, further, the record shows that Bilek continued to use them after he had been notified that his right to do so had ended. It will be difficult, if not impossible, to apply any rule to determine what damage was or might have been created by his conduct in so doing, and we think that the case was peculiarly one requiring a remedy by injunction. Indeed, this remedy is specifically given by section 4 of chapter 140, Illinois statutes, an act entitled, "An Act to protect associations and unions of workingmen in their labels, trademarks, etc.," which section also provides that the court in a proper case may hold that all counterfeits or imitations of genuine labels under the control of the defendant in a particular case may be ordered delivered to an officer of the court or to the complainant to be destroyed. But aside from the statute, we think it appears on the face of the bill that the complainant did not have an adequate remedy at law? The real subject matter of this suit is not the particular tangible property called the labels. It is the imprint, the design or trade mark which the defendant insists he has a right to use, and it is this intangible thing which constitutes the real basis of the bill. Upon the merits of the controversy, as to whether Bilek violated the rules and contract referred to, or whether he used the alleged changed or blurred

label and its number, we are of opinion that the master who heard the evidence and the chancellor were in a better position to judge of the matter than are we. There is evidence in the record which tends to support the material allegations of the bill, and we are not authorized to say that the decree finds no sufficient support in the evidence.

In Ruddy v. McDonald, 224 Ill. 494, the Supreme court said:

> "There is evidence in the record to support each finding made. The chancellor, upon exceptions to the report, has confirmed the findings of the master in every particular. Where the evidence is conflicting and the chancellor has confirmed the findings of the master, this court will not disturb the decree unless it is clearly and manifestly against the weight of the evidence."

We do not think that the bill is one for specific performance. The bill does not seek a performance, but a revocation of the rights granted to Bilek under the contract; that is, complainant asserts in his bill that Bilek has been guilty of a breach of the contract, and that thereby complainant and those whom he represents have a right to revoke it.

We do not believe that the defendant was entitled to any specific form or notice of the intention of the Council's committee to hear the complaint made that Bilek had wrongfully used the label. The contract specifically provides that the committee was authorized to take action without notice. However, Frans, who had an interest in the business, did receive notice and was present at the hearing. Bilek certainly received notice of the determination of the committee shortly thereafter and he failed to appear at a subsequent meeting held April 19, 1916.

Cases relied upon by defendant are for the most part cases where by-laws required notice of an intended action affecting the rights of the members. Here defendant's right to use the label, by the express terms of the contract, im-

mediately terminated upon a breach thereof, and he waived, by express language, any notice of the intention of the Association to revoke the license. M. W. Trav. Men's Assoc. v. Schauss, 148 Ill. 311.

The decree of the Superior court will be affirmed.

AFFIRMED.

Holdom, P. J., and McSurely, J., concur.

234 - 26606

ELAIN VOSS,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY, CHICAGO CITY RAILWAY COMPANY, CALUMET & SOUTH CHICAGO RAILWAY COMPANY and THE SOUTHERN STREET RAILWAY COMPANY, corporations, doing business under the name and style of CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

220 I.A. 633

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendants appeal from a judgment entered in the Superior court of Cook County against them and in favor of the plaintiff for the sum of $3,500.

The case was tried upon one count of a declaration, originally consisting of two counts, which alleged that certain of the defendants maintained and operated certain street car lines on State street in the city of Chicago between Washington street and Madison street; that one of said lines turned from State street toward the west into Madison street; that street cars operated by defendants on State street were so constructed as to admit the taking on and letting off of passengers at their rear ends, and that said cars stopped at the north side of Madison street for the purpose of taking on and discharging passengers; that when a southbound State street car stopped at the north side of Madison street its rear end was 30 feet north of the north line of Madison street; that the plaintiff in the exercise of due care for her own safety was standing 30 feet north of the north line of Madison street in State street waiting for a southbound State street car on which she intended to become a passenger; that while she was so standing and when her presence and position there

were, or should have been by due care, known to said defendants, they by their servants in charge of a certain Madison street car carelessly managed, operated and drove said Madison street car south in State street; that said Madison street car was caused to and did run into and upon plaintiff standing in State street, as aforesaid, and that she was thereby injured.

The evidence shows that the plaintiff on March 19, 1917, the day of the accident, was engaged in shopping in the retail district in the city of Chicago until about three o'clock in the afternoon; that with the intention of returning to her home on the south side of the city, she walked into State street, a north and south street, at the north side of Madison street, an east and west street, intending to board at this point a south bound 51st street car. It is stated by counsel for defendant that the regular stopping place of southbound street cars was south of the south line of Madison street. It seems to be conceded, however, that southbound cars were stopped for the purpose of taking on and letting off passengers on the north side of Madison street. This seems to have been done at such times as the traffic in Madison street would be moving east and west. The north curb line of Madison street east of State street is 16 feet 2½ inches north of the curb line west of State street, and for this reason the cross walk from the east to the west side of State street runs somewhat on an angle. The roadway in State street is about 70 feet wide. Two street railway tracks, known as the north and south bound tracks, are laid down in State street; these tracks occupy a space in the center and east of the center of the street. Due to a jog in the east and west lines of State street, its center line south of Madison street is east of its center line north of that street; this jog or offset in the street causes a veering of the tracks at the intersection

of the two streets. In addition to the two tracks referred to a third track is laid down in State street which extends from Washington street south on State street and west into Madison street. Due to a curve of this track into Madison street and the eastward turn of the other tracks in State street, the distance between the Madison street track and the west track of the State street tracks gradually increases beginning at a point about 100 feet north of the north Madison street building line. The record discloses measurements and distances in addition to those already given, but for the purposes of this opinion it will not be necessary to deal further with the physical conditions which surrounded the plaintiff at the time of the accident. Whether the defendant was guilty of the negligence charged in the declaration, or whether the plaintiff was guilty of contributory negligence, as earnestly contended by defendants' counsel, were closely contested questions in the trial of the case. We do not deem it advisable to make comment upon the evidence introduced on the trial touching these questions, except to say that from a review of all the evidence we are of the opinion that upon these questions the case is one for decision by the jury.

The plaintiff's contention is that just before the accident occurred she had walked into State street and had taken a position 75 feet north of Madison street, and that while so standing, in the exercise of due care for her own safety, she was struck by the front part of a southbound Madison street car; that just before she was struck a southbound State street car stopped with its front end near the north line of Madison street; that this car was not the one that she intended to board; that she remained standing where she had stopped on State street; that at the time she did not notice her proximity

to the Madison street line track, and that while so standing she was struck, as stated above.

The defendant's position is that the plaintiff just before the time of the accident was seen standing in the space between the State street track and the Madison street track, north of the north line of Madison street; that a southbound Madison street car stopped a short distance north of Madison ste street because a traffic officer had given a signal for the movement of east and west traffic; that when a signal was given for the movement of the north and south traffic the Madison street car was set in motion and moved around the curve into Madison street; that in so doing the car did not come in contact with anyone; that when it was started at this point no one was standing so near to the Madison street track as to be endangered by the movement of the car; that the car moved slowly around the curve and that while so doing the plaintiff, with her face toward the east, stepped backward into and against the rear end of the car as it was moving around the curve. The sharply contested questions of fact then were whether the plaintiff was struck, as she and her witness asserted, by the front part of the car, or whether she stepped backward into the rear end of the car as it turned about the curve into Madison street; and as stated, we believe there was sufficient evidence in the record for the submission of these contested questions to the jury. The court, however, in its instructions to the jury refused to give instructions Nos. 1 and 5, respectively, tendered on behalf of the defendant. These two instructions are as follows:

"1. If the jury believe from the evidence that the plaintiff was standing in the space between the tracks on which the State street cars operate and the tracks of the Madison street cars on State street, and if you further believe from the evidence that as the Madison street car approached the place where the plaintiff was standing, the plaintiff was clear of the overhang of the Madison street car, and, if

you further believe from the evidence that after the front of the Madison street car had passed the point where the plaintiff was standing she changed her position so as to bring herself in contact with the rear end of the Madison street car, as it rounded the curve, then in such case the plaintiff cannot recover and the verdict must not be guilty."

"5. The court instructs the jury that the defendants in this case cannot be held liable for the injury to the plaintiff on the ground that the tracks in State street on which defendants' cars operate were not properly constructed nor because of the extent to which the Madison street car overhung the rail as it rounded the curve into Madison street. The only negligence charged against the defendants is that the defendants carelessly and improperly operated their Madison street car south in State street and around the curve into Madison street and as a result of such alleged negligence plaintiff was injured. If this charge of negligence is not established by the preponderance or greater weight of the evidence, then the verdict must not be guilty."

We think the court erred in its refusal to give these instructions and that this is particularly so with reference to tendered instruction No. 1. This instruction, even though it did direct a verdict, informed the jury that if the jury believed that plaintiff was injured after the front of the Madison street car had passed the point where she was standing and that she thereafter changed her position so as to bring herself in contact with the rear end of the car as it rounded the curb, she could not recover. We think this instruction should have been given. The instruction does not refer to a mere evidentiary fact in the case; it deals with an ultimate question which the jury were called upon to decide. As hereinbefore stated, it was a clean cut and closely contested question of fact whether the plaintiff was struck by the front of the car while she was awaiting a southbound car on the next easterly track, or whether, as urged by defendants, the front part of the Madison street car had passed her and that she had backed into the rear end of the car as it turned around the curve. The theory of the plaintiff was the former, and that of defendants the latter, and the defendants had a legal right to have their theory of the case submitted to the jury under proper instructions. We

do not think instruction No. 1 was misleading nor that its substance was contained in other instructions given to the jury.

The case of Sullivan v. Glamer Co., 291 Ill. 335, cited by plaintiff does not support the contention that because this instruction directed a verdict it was thereby insufficient. In the Sullivan case the instruction was held to be properly refused because it omitted to include the element of negligence charged with respect to a defective windshield. In the present case, however, the instruction deals directly with the only question upon which, as shown by the evidence, the plaintiff relied. It is true that the declaration charges negligence generally in the operation and management of the Madison street car. The evidence introduced on behalf of the plaintiff fixes this negligence as the act of the defendants in striking plaintiff with the front end of the car. The defendants' theory of the accident as shown by the evidence is that the plaintiff was not struck by the front end of the car, but that she backed into its rear end as it moved around the curve, and if this theory was sustained by sufficient evidence, the defendants unquestionably would be entitled to a verdict in their favor. As we read the case of Wilson v. Danville Coal Co., 246 Ill. 147, that authority does not sustain the position taken by plaintiff's counsel with reference to this instruction.

Instruction No. 5 states a proposition which we think should have been submitted to the jury.

The count of the declaration upon which the case was tried charges negligence in the management and operation of the Madison street car. No charge is made therein of faulty construction of the tracks or car, or with respect to the location of the tracks upon which the Madison street car was operated at the time of the accident. There is, however, some force in the argument

that the instruction might, unless carefully read, tend to mislead the jury. This effect could be avoided by so phrasing the instruction as to inform the jury that if the injury to the plaintiff resulted solely from the position of the tracks or the overhang of the car, she could not recover. It is our opinion, however, that the instruction as tendered was substantially correct.

The judgment of the Superior court is reversed and the cause remanded.

REVERSED AND REMANDED.

Holdom, P. J., and McBurely, J., concur.

884 - 26056

KITTIE McGRATH,
Appellee,

vs.

CITY OF CHICAGO, a Municipal Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

220 I.A. 634

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment entered in the Superior court of Cook County in favor of plaintiff for the sum of $6,000.

Plaintiff brought her action against the plaintiff to recover for personal injuries alleged to have been received by her by reason of stepping into a hole or depression in a public highway. The only point made against the validity of the judgment is that the court erred in giving instruction number 6 to the jury at the request of plaintiff and in refusing to give, at the request of defendant, instruction number 1. Instruction number 6 is as follows:

> "The court instructs the jury that if you believe from the evidence that the roadway in South Halsted street, at the place of the accident, was habitually used, long prior to and at the time of the accident, by large numbers of people, in walking to, from, and between street cars, or otherwise; and that such use was a proper use of the roadway at the place, and was known to and acquiesced in by the defendant, then it was the duty of the defendant to exercise ordinary care toward keeping the roadway at that place in a reasonably safe condition for such use."

Instruction number 1, which was requested by the defendant and which the court refused to give the jury, is as follows:

> "You are instructed that the City of Chicago is not bound to keep the driveway of its streets longitudinally between the sidewalks and not at a public crossing reasonably safe for pedestrians, and is not an insurer against accidents. Its only duty in that regard is to use ordinary care to keep them reasonably safe for horses and vehicles. And if you find

from a preponderance of the evidence that the place where the said accident is claimed to have occurred was in the driveway of the street and not at a public crossing, and that it was reasonably safe for horses and vehicles, you should find the defendant not guilty."

Evidence introduced on behalf of the plaintiff tends to show that the accident occurred at about 7:30 o'clock in the evening of September 7, 1915, near the intersection of 79th street and Halsted street in Chicago. Double street railway tracks are laid down along and near the center lines of both streets. Seventy-ninth street extends east and west, and the southerly track is what is known as the east-bound track. Halsted street runs north and south and the east track therein is known as the north-bound track. Just before the time of the accident the plaintiff was riding on Halsted street in a north-bound street car which stopped immediately south of the south line of 79th street. The conductor on the street car then instructed the plaintiff and other passengers that the car was to proceed no farther, and that they were to transfer to a car then standing in Halsted street north of 79th street. Plaintiff, who was accompanied by her brother, got off the rear platform of the car and proceeded to walk north in the roadway between the east track on Halsted street and the east curb line. The rear platform of the street car which plaintiff had left at this time stood about 100 feet south of the south building line of 79th street. Plaintiff in her course north passed the car in which she had been riding, and when she had reached a point a few feet north of the north end of the car, she stepped into a hole or depression in the street which caused her to fall to the ground. She sustained therefrom serious and permanent injuries.

In support of the contention that the court erred in giving instruction number 6 and in refusing to give instruction number 1 to the jury, it is contended that:

"A city is not required to keep the roadway of its streets safe for pedestrians, except at established crossings, and is only required to maintain its streets and sidewalks reasonably safe for the uses and purposes to which such respective parts are dedicated."

The place where the accident happened is a transfer point and it seems to be conceded that large numbers of persons use the roadway for foot travel in transferring from street cars operated upon 79th street and Halsted street. The hole in the street which caused the accident was at a point about 22 feet south of 79th street. The distance between the east rail and the east curb line on Halsted street is about 17 feet and it might reasonably be expected that passengers transferring just south of Halsted street to a car standing on Halsted street north of 79th street would naturally, in the absence of known dangers or obstructions, walk along the roadway on Halsted street and across the tracks on 79th street. We are not convinced that under the conditions which existed at the time and place of the accident the plaintiff was required to use the sidewalks. It is a matter of common knowledge that street cars ordinarily stop to take on and let off passengers in such manner as not to block or impede the right of pedestrians to use cross walks. The car upon which the plaintiff was riding before the accident was to be switched onto the southerly track on 79th street, where it was to continue to the car barns; twenty or thirty passengers who left the car with plaintiff proceeded northward on the street, as did plaintiff, by walking between the track and the east curb line toward the car which was standing on the north side of 79th street.

From all the evidence introduced on the trial it is clear that that part of Halsted street upon which plaintiff and other passengers walked to the waiting car was to a consider-

able extent devoted to the use of pedestrians transferring to and from the different car lines.

In the case of Maxey v. City of East St. Louis, 158 Ill. App. 627, the plaintiff got off a street car and stepped into a hole in the street and was injured. In deciding the case the court said:

> "It is insisted by the appellant that there is no liability against the city in this case because the hole or depression was not in any sidewalk or crossing of the city, and that it is under no legal obligation to keep the driveway of its street longitudinally in a fit and safe condition for pedestrians. It was said in substance in City of Aurora v. Hillman, 90 Ill. 61, and in The Pres. and Bd. of Trustees of Harvard v. Benger, 54 Ill. App. 443, that a city is not bound to keep its whole street fit and safe for foot passengers. If this must be accepted as the general rule of law, still we think that under the holding of our courts that there are exceptions to the rule. A city may reserve portions of a street for pedestrians and portions thereof for the use of vehicles only, and portions thereof for both pedestrians and vehicles. Sidewalks are usually made for pedestrians only, and street crossings for both pedestrians and vehicles. Cities are required to use reasonable care to keep street crossings in reasonably safe condition for pedestrians while in the exercise of reasonable care and caution. This is not denied by appellant. The true rule in all cases, we think, is that a city is only required to maintain the respective portions of its streets in a reasonably safe condition for the purposes to which they are respectively devoted by the intention and sanction of the city. Gehlhaf v. The City of Chicago, 142 Ill. 349; Town of Normal v. Wright, 223 Ill. 99; City of Beardstown v. Smith, 150 Ill. 169."

The evidence shows without much doubt that the car upon which the plaintiff had been riding stopped at the usual place for taking on and letting off passengers, and that plaintiff and the passengers who left the car with her traversed the route customarily used by persons transferring from one street car to another at this point. Certain evidence tends to disclose that the conduct of the plaintiff and other passengers at the time of the accident was in accordance with the general custom in use at the place where the accident happened, and it is a fair presumption that the City knew and ought to be charged with knowledge of this custom. No claim is made that the City was not negligent

in permitting the hole or depression to remain in the street.

As held in Kohlhof v. City of Chicago, 193 Ill.640, the City Council of the City of Chicago has ample power to designate portions of the streets of the city to be used by vehicles and to reserve other parts of the streets to be used by pedestrians, and that no greater duty is cast upon the city than to maintain the respective portions of the streets in reasonably safe condition for the purpose for which such portions are respectively devoted. And it is true that generally sidewalks are intended for foot passengers and the roadways for vehicles, but this rule, as stated in the Lacey case supra, is subject to exceptions, and where it appears, as in the present case, a part of the street or roadway is devoted to the joint use of vehicles and of pedestrians, the law imposes the duty upon the city to keep such portions of the street in a reasonably safe condition for both purposes. Counsel for defendant seek to distinguish the Lacey case supra by saying that it was held under the facts of that case that the plaintiff was injured while actually alighting from the car and that it was necessary for passengers to walk on the roadway in order to reach the sidewalk or street crossing. We think it was properly held in that case that it became the duty of the city to keep the street "longitudinally in a fit and safe condition for pedestrians" using the streets in a manner within the intent and sanction of the city.

It is our view that the court did not err in giving instruction number 6 or in refusing to give instruction number 1.

The judgment of the Superior court is affirmed.

AFFIRMED.

Holdom, P. J., and McSurely, J., concur.

316 - 26088

Certiorari denied (1423a)

DANIEL DUFFY,
Appellee,

vs.

P. F. McCARTHY and
M. E. BYRNE, copartners
as McCARTHY & BYRNE.

P. F. McCARTHY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

220 I.A. 634

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Daniel Duffy brought suit in the Municipal Court against the defendants P. F. McCarthy and M. E. Byrne, as copartners doing business under the firm title of McCarthy & Byrne. Judgment was entered in favor of the plaintiff against all of the defendants for the sum of $1,747.59, which defendant P. F. McCarthy seeks to reverse by his appeal to this court.

The evidence introduced on the trial tends to prove that the plaintiff was the owner of an apartment building in the City of Chicago; that the defendant P. F. McCarthy had acted as his agent handling his real estate and collecting rents from the year 1904 until the year 1911, at which time McCarthy's property and business were placed in the possession of the Chicago Title & Trust Company as receiver. Thereafter the business formerly conducted by McCarthy was carried on under the name of M. E. McCarthy, his daughter, and later, upon her marriage to M. E. Byrne, was conducted under the firm name of McCarthy & Byrne. In 1918 the plaintiff discovered that a janitor had taken coal from the basement of the apartment building, owned by plaintiff, and in charge of McCarthy & Byrne, as his agents, and had removed it to another building, of which McCarthy & Byrne were also agents. The plaintiff

thereupon terminated the agency and demanded that the defendants turn over to him leases made with tenants in the building and also any balance due him on account of rents collected from tenants.

The defense set up at the trial and urged here is that the evidence fails to disclose that F. F. McCarthy was a member of the firm of McCarthy & Byrne and also that the evidence affirmatively shows that under a general custom and usage among real estate dealers and agents a charge was permissible for commissions upon all leases obtained or executed through the efforts of agents where there had been a termination of the agency prior to the termination of such leases; that under this custom defendants were entitled to deduct from rents in their hands belonging to plaintiff a sum which would reduce the amount due the plaintiff from the sum of $2,018.30, claimed by plaintiff, to $945.91.

It is our belief that the court, which tried the case without a jury, had evidence before it from which it could conclude that defendant, F. F. McCarthy, was a member of the firm of McCarthy & Byrne.

On May 23, 1911, McCarthy and his attorney agreed with plaintiff that McCarthy was to continue as plaintiff's agent after the receiver for his property had been appointed and that the business to be conducted by McCarthy was to be carried on in the name of his daughter, M. F. McCarthy, who was then but 18 years of age. McCarthy's business appears to have been carried on in substantially the same manner as before the alleged transfer to his daughter. It is true that the business after August, 1912, was carried on in the name of McCarthy & Byrne, but the plaintiff testified that he first became aware of this change when he received a monthly

statement upon which the name "M. E. McCarthy" had been changed by striking out the letters "M. E." and adding "& Byrne," and that subsequently McCarthy, appellant, had stated to him that his daughter had been married and that the change had been made in order to keep the name "McCarthy" in the business. It is hardly reasonable to suppose that appellant's daughter would be desirous of including both her maiden name and marriage name for the purpose of identifying herself with the business. We think it more reasonable to suspect that the intention was to preserve appellant's nominal as well as actual connection with the firm. It is shown without much question that McCarthy was actively engaged in doing a real estate business both before and after the appointment of the receiver, and that he had advised with the plaintiff at the time he transferred his property to the receiver and that plaintiff and McCarthy both understood that McCarthy's agency was to continue thereafter.

It will be unnecessary to discuss all the evidence touching this question. It is our opinion, however, that sufficient evidence was submitted to warrant the trial Judge in finding that McCarthy, after the receivership and up to the time of the termination of the agency, had continued to act as plaintiff's agent. Plaintiff and defendant, McCarthy, were friends of many years standing. The evidence shows that defendant's eighteen year old daughter had had no business experience of any sort prior to the alleged transfer to her of her father's business which the defendant asserts he was thereafter connected with only as manager. It would not be reasonable to conclude that under such conditions the plaintiff would look to the defendant's daughter for a proper performance of the services required under the agency contract. Under all the evidence, we think the trial

Judge was justified in his conclusion that the transfer of McCarthy's busines to his daughter was merely colorable and that he, McCarthy, had dealt with the plaintiff as a principal. It may be true, as asserted and argued, that McCarthy was the owner of the entire business conducted by McCarthy & Byrne. On this point, however, McCarthy and the other witnesses say otherwise.

It is our opinion also that the evidence shows without much question that considerable quantities of coal were taken from plaintiff's building to another of which McCarthy & Byrne were the agents. The evidence tends to prove that P. F. McCarthy admitted knowledge of the fact that the coal had been taken; that he asserted that it was taken because weather conditions rendered it difficult to provide fuel for the building in which the plaintiff had no interest. The evidence also tends to show that McCarthy not only knew that the coal had been taken, but that he had ordered the janitor to remove it to another building; and further, that at this time McCarthy was calling upon plaintiff for more coal for plaintiff's building.

While there is much conflict in the evidence there is sufficient to sustain the findings of the trial Judge.

It is insisted by the defendant that a custom existed among real estate agents under which the defendants were authorized to charge a commission upon the unexpired leases, 27 in number. On this question W. E. Byrne, one of the defendants, testified that a custom existed which permitted a commission charge on the unexpired portion of the leases amounting to a total sum of $797.37, and that this chafge was in accordance with the rules of the Chicago Real Estate Board. Upon cross-examination, however, she stated with reference to this custom, "That is simply optional with each real estate office itself," and that "They do

not charge what the real estate board rules prescribe." P. F. McCarthy also testified that while there was a customary commission charge on unexpired leases that "our offices, however, only charged on the uncollected portion of the lease where it was less than six months." Evidence was admitted on behalf of the defendant which tends to show the usual charges as prescribed by the Chicago Real Estate Board. The record shows that all three defendants, including appellant, were members of the board, but otherwise we are not informed as to just what the Chicago Real Estate Board includes. Aside from the charges prescribed by this board, the evidence does not satisfactorily establish a general custom with relation to the charge in question. The witnesses Gilbert and George testified to the rate of such charges as fixed by the board. We do not think that standing alone this evidence is sufficient to establish a general custom among all agents doing a real estate business in the City of Chicago. The witness George said that the Cook County Real Estate Board also had rules on the subject, but so far as he knew there were no customs other than those embodied in the rules of the two real estate boards. The record does not disclose whether the custom as said to be established by these boards was generally known and acted upon by all persons acting as real estate agents in the City of Chicago, or that the rules were so generally known to and accepted by all such persons and others dealing with them as to establish a general custom as is claimed in the present case.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Holdom, P. J., and McSurely, J., concur.

341 - 26113

H. SCHWARTZ,
Appellee,

vs.

RUBIN WEISBROD,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

220 I.A. 634[3]

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff, H. Schwartz, brought suit in tort in the municipal court of Chicago against the defendant, Rubin Weisbrod, for an alleged fraudulent conversion by defendant of a pair of diamond earrings. Judgment was entered in favor of the plaintiff for the sum of $330, which the defendant seeks to reverse by his appeal to this court.

The evidence introduced on behalf of the plaintiff was to the effect that the defendant entered plaintiff's place of business April 6, 1916, and stated to defendant that he desired to obtain a pair of diamond earrings for a customer; that a pair of earrings was delivered to defendant, who at the same time signed the instrument following:

"Chicago, April 6, 1916.
No. 2871
From H. Schwartz, Diamond Importer, Maker of High Grade Diamond Jewelry, 29 N. Madison Street. 'Phone Central 6594.
These goods are for your examination and remain the property of H. Schwartz, and are to be returned to them on demand.
$90 1 pair earrings 2 66/100 $385.00.
Rubin Weisbrod."

A short time after this transaction the plaintiff went to New York and remained there about two months, during which time his business was in charge of his son and daughter. The evidence of plaintiff seems undisputed that the son had no

authority from his father to extend credit to anyone. April 30, 1916, defendant stated to plaintiff's son that he had sold the earrings to his customer who had agreed to pay for them in installments, and that he, defendant, desired to pay plaintiff in the same manner. Defendant then tendered eleven promissory notes for the total sum of $380, the purchase price of the earrings. The evidence tends to prove that plaintiff's son then informed the defendant that he had no authority to extend credit, but that he would take the notes subject to his father's approval. The evidence shows that the defendant had not in fact sold the earrings to a customer, but later, after April 30, 1916, on which date plaintiff's place of business was destroyed by fire, had pawned them, obtaining thereon a loan of $300. May 4, 1916, defendant was adjudicated a bankrupt on an involuntary petition filed against him. The evidence further shows that on plaintiff's return from New York, between the 5th and 10th day of June, 1916, he attempted to return the notes given by defendant, but was unable to find him, as his place of business had been destroyed by fire. Plaintiff obtained the pawn ticket for the earrings from the trustee in bankruptcy and redeemed the earrings at a cost of $350.

We think the judgment is right and that it should be affirmed. While there is some dispute in the evidence, we think the jury was warranted in concluding therefrom that the defendant had with fraudulent purpose obtained the earrings from plaintiff. The instrument signed by him April 6, 1916, indicates that the value of the earrings was $380. If the evidence submitted by the plaintiff be true, then it is perfectly clear that the defendant pawned this property for $300, and this within a very short time after defendant had been adjudicated a bankrupt. His conduct in this particular at least amounted to the perpetration

of a fraud upon either the trustee in bankruptcy or the plaintiff. The defendant's assertion that the plaintiff sold him the earrings April 6, 1916, is directly contradicted by the testimony of the plaintiff, which is in some degree corroborated by the instrument signed by the defendant at the time he received the earrings.

There is a direct conflict in the evidence as to what was said by the plaintiff's son and defendant at the time the notes were delivered to plaintiff's son. There is sufficient evidence, however, in support of the position that the son had no authority, as agent of his father, to extend credit to defendant.

There is no merit in the claim that the plaintiff should have made a demand upon the defendant for the return of the diamonds. After plaintiff's return from paw Paw he discovered that the defendant had been adjudicated a bankrupt and that he had pawned the diamonds, which the plaintiff asserts had been given him for the sole purpose of exhibiting them to a proposed purchaser. The evidence is undisputed that the diamonds were pawned without authority and without the knowledge of plaintiff, and that they were not in possession or under the control of the defendant at the time they were redeemed by the plaintiff.

As we understand the evidence it shows that the defendant was guilty of an unauthorized conversion of property belonging to the plaintiff. Under these circumstances a demand was not necessary. Stockyards Co. v. Mallory, 157 Ill. 544. The statement of claim was sufficient. It charged in substance that the defendant fraudulently converted the property of plaintiff to his own use to the damage to the plaintiff in the sum of $1,000. The damage to the plaintiff is shown by the fact that through the wrongful conduct of defendant plaintiff was compelled to pay the

sum of $330 before he could obtain possession of his property and this sum was properly proven as the plaintiff's damages resulting from the defendant's wrongful conduct.

No reversible error was committed by the trial court in its rulings upon the admission of evidence.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

Holdom, P. J., and McSurely, J., concur.

333 - 24132

MARY HEGGERS,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY, CHICAGO CITY RAILWAY COMPANY, CALUMET & SOUTH CHICAGO RAILWAY COMPANY, and THE SOUTHERN STREET RAILWAY COMPANY, operating under the name and style of CHICAGO SURFACE LINES, Impleaded, etc.,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

220 I.A. 634

MR. JUSTICE DRIVER DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained a judgment in the Circuit court of Cook County against the defendants for the sum of $5,000.

The case was tried on the first count of a declaration which charged in substance that the plaintiff sustained injuries through the negligence of certain of the defendants in that said defendants negligently permitted plaintiff to alight from a street car upon which she had been riding as a passenger at a point in a public highway where she, in the exercise of due care for her own safety, unavoidably stepped and fell into a hole in the highway and thereby sustained injury.

At the close of plaintiff's evidence defendants Ready & Callaghan Coal Company and the City of Chicago were dismissed out of the case. The accident occurred in the forenoon of May 2, 1916, on South Racine avenue, a north and south street, near its intersection with 79th street, an east and west street. The Ready & Callaghan Coal Company, contractors for the City of Chicago, just before the date of the accident had excavated South Racine avenue between 74th street and the north cross walk at 79th street on both sides of the street between double street railway tracks and the curbing. The excavation caused a lowering of the street surface to a distance of from 6 to 10 inches below

the rails. The plaintiff, a woman 55 years of age, was riding just before the accident on a southbound streetcar on Racine avenue. The car stopped at 79th street at a point where its front platform extended south of the south end of the excavation and its rear end north of this point. Evidence introduced on the trial tends to prove that the lower step of the rear platform at the place where plaintiff alighted from the car was 26 inches above the street level. The plaintiff denied that she knew or that she had any notice that the street had been excavated.

It is urged that the evidence does not disclose that the defendants were guilty of actionable negligence or that the plaintiff was in the exercise of due care for her own safety, and also it is asserted that in that a directed verdict was entered in the cause in favor of the City of Chicago and the Handy & Gallaghan Coal Company, the same verdict should have been rendered in favor of all the other defendants in the cause, for the reason that the declaration charged that all of the defendants, originally made parties to the action, were charged to have operated "as one cause" in causing the injury to plaintiff.

Our attention has been directed to many authorities, all of which sustain the position taken that the law requires a person to use his faculties in such reasonable manner as to avoid accidents and injury if he can reasonably do so. The evidence in this case does show that the plaintiff could have seen the condition of the street at the point where she was about to alight from the street car just before the accident happened, but whether she did in fact see and appreciate the actual distance between the lower step of the rear platform and the surface of the street as excavated and whether in stepping from the car onto the street, a distance of 26 inches, she acted with due caution, were, we think, under all the evidence in the case, questions of fact for the determination

of the jury. It cannot be said that plaintiff's failure to ascertain the distance between the step and the surface of the street constituted a failure on her part to exercise ordinary care for her own safety, even though, as conceded in this case, the accident happened in broad daylight. It should be kept in mind that we are dealing here with an act performed by the plaintiff which under ordinary circumstances and conditions would not call for the exercise of an extraordinary degree of watchfulness. If it be true that she had not notice that the street had been excavated, she might well have assumed that no such change had taken place in the position of the surface of the street as would make it hazardous for her to step from the car at a point where the defendant's servants had impliedly invited her to do so by their act in stopping the car.

It has been held in many decided cases that it is the duty of persons under certain conditions to look and listen for dangers that might reasonably be expected to be present, as where persons are about to cross railway crossings or heavy traffic streets. We may agree that a passenger on a street car may not assume that he can alight therefrom without giving any heed to the condition of the street on which he is about to alight. The law is that under such circumstances the passenger is required to exercise a reasonable degree of care for his own safety. Whether the plaintiff did, however, exercise this degree of care under the circumstances was a question of fact for the jury.

Counsel for defendants have cited cases decided by courts of review in Michigan, Indiana, and Massachusetts which sustain their contention, but we are not inclined to follow those cases. It is not denied that plaintiff desired to leave the car at 74th street; that through error of some sort she was carried beyond her destination to 79th street, and whether she

was guilty of negligence, in her failure to see and note the condition of the street when under the circumstances, in the confusion of mind which might naturally be occasioned by her discovery that she had been carried several blocks beyond her intended destination, was a question for the jury.

Cases relied upon by counsel do not aid us greatly in determining the question of plaintiff's lack of care or negligence. Chicago Terminal R. Ry. Co. v. Schmelling, 197 Ill. 618; Pennsylvania Co. v. McCaffery, 175 Ill. 169; C. M. & St. P. Ry. Co. v. Halsey, 142 Ill. 338.

In the case of C. & A. Ry. Co. v. Noble, relied on by defendants, the plaintiff had gotten on and off trains a great many times at the place where she was injured. She saw just before she stepped from the car that the foot steel had not been placed on the ground and she stepped directly off the step of the car without taking hold of the handrail on either side.

In McAvey v. St. L. Springfield & Peoria R., 180 Ill. App. 620, it appears that the plaintiff, after her two children who preceded her had been helped from the lower step of the car, jumped to the ground, a distance of three feet. In this case it was held plaintiff was guilty of negligence.

The gravamen of the charge in the present case is that the defendants were negligent in failing to provide a safe place for passengers to alight from the car, and it is our opinion that this question also was properly submitted by the trial court to the jury. There is some dispute in the evidence as to whether the plaintiff informed the conductor that she wished to get off the car at 74th street and Racine avenue and whether she was, without negligence on her part, carried beyond her destination to 79th street. We do not think these questions important, as the undisputed fact is that she rode in the car

as a passenger until she reached the latter street, where she attempted to alight from the car. The plaintiff denied that she had any knowledge of the condition of the street at the time she attempted to step from the car and that she had received warning from the conductor concerning the condition of the street. The undisputed evidence shows that if the car had been moved a short distance south of the place where it stopped, plaintiff could have alighted therefrom by way of the rear platform in safety, or she could have stepped from the car without danger of injury to herself had she been directed to leave by way of the front platform.

In the recent case of MacArthur v. Chicago City Railway Company et al. (opinion filed October 11, 1938, not yet reported) the plaintiff in attempting to alight from a street car stepped into an uncovered manhole. This court held that the plaintiff was not guilty of contributory negligence as a matter of law. In the opinion of the court by Mr. Justice Scanlan it was said:

> "While a street railway company may not be responsible for the condition of the street, unless it be between or in the immediate vicinity of its tracks, yet it will be liable to a passenger injured without his own fault, in consequence of stopping its car for a passenger to alight at an improper or dangerous place, especially where no warning of the danger is given to the passenger. (Thompson on Negligence, vol. 3, section 3525.
>
> This rule is well established. West Chicago St. R. R. Co. v. Buckley, 102 Ill. App. 514; Gleeum v. Peoria Ry. Co., 179 Ill. App. 317, and many other cases."

In the Buckley case cited above it was said:

> "A carrier is bound to afford passengers a safe place at which to alight; it has the right to select such place and if it do so and afford the passenger a reasonable time in which to depart, the end of his journey having been reached, its duty as a carrier is at an end. Hutchinson on Carriers, sec. 612 - 613."

These authorities and many others that might be cited clearly recognize the existence of a rule of law which requires operators of street cars and like conveyances to exercise

the highest degree of care for the protection of passengers riding in, upon, or alighting from passenger cars. It is not meant to assert here that the relationship of passenger exists toward a common carrier after the passenger has alighted in safety from the car.

The declaration filed in the cause charged the parties originally joined as defendants in the action with separate and distinct acts of negligence and in a paragraph of the declaration it was stated that "taken in combination and in conjunction" and "operating as one cause," the defendants' negligence resulted in injury as alleged by plaintiff. The City of Chicago and the Healy & Gallagher Coal Company were charged with having created and caused a large and dangerous hole to be in and remain in Racine avenue, etc. The trial Judge directed a verdict in favor of these two defendants. With reference to the other defendants it was charged that they negligently caused the car to be stopped for the purpose of permitting the plaintiff to alight therefrom opposite and in close proximity to the described defects in the highway, and that they negligently failed to inform the plaintiff of the existence of said defects. As we read the declaration it was charged therein that the defendants against whom the judgment was rendered were guilty of acts of negligence different in kind from that charged against the defendants in whose favor the directed verdict was returned. The street railway companies were charged with negligence of a sort which it is alleged directly caused the injuries to plaintiff. It is true that at one place in the declaration it is charged that these several acts of negligence operating as one cause produced the injuries, but we are inclined to the view that this expression should be treated as the conclusion of the plead-

er and that the declaration is in such form that if supported by evidence judgment could have been rendered against any or all of the parties who were originally joined as defendants. Pierson v. Lyon & Healy, 243 Ill. 270.

The judgment of the Circuit court is affirmed.

AFFIRMED.

Holdom, P. J., and McSurely, J., concur.

(1455a)

154 - 25925

CORA A. SHAW, Appellee, vs. A. W. MEYER et al. On Appeal of A. W. MEYER, GEORGE F. POULSEN and F. G. BARTELS, Appellants.	APPEAL FROM COUNTY COURT OF COOK COUNTY.

220 I.A. 635

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover compensation for her services as stenographer against defendants as stockholders of the Columbine Stockholders Association. Upon trial she had a favorable verdict and judgment was entered against defendants for three hundred and twenty-three dollars.

The essential question is whether plaintiff was employed by defendants or by a Mr. Willard A. White, who was the attorney for defendants. It seems that the Association was involved in litigation and there is some attempt by defendants to prove that plaintiff was employed upon the condition that she was to be paid for her services out of a fund to be raised for the expenses of the litigation by solicitation from the stockholders and plaintiff should collect this but had not done so. There is evidence tending to show that this was the arrangement with plaintiff's predecessor in this position, but the jury was justified in believing that plaintiff had no knowledge of such an arrangement nor in any way acquiesced therein. The evidence shows that plaintiff had her first interview with White, who was the attorney for the Association, and was informed as to the duties of the position and amount of her compensation, twenty-five dollars a week. There

is evidence that subsequently defendant stockholders were informed of this employment and ratified the same. Three of the defendants, Meyer, Poulsen and Cribbs, met plaintiff and were informed by White that she had been hired to work for the Columbine Stockholders Association at twenty-five dollars a week. Instructions as to her work were given by some of the stockholders. Plaintiff proceeded to give her services to this work and there is evidence that she also kept minutes of meetings. At one time she told the committee of stockholders that she would have to cease her work unless she was given her salary, which was then in arrears, and she was requested to adjust the matter with Mr. Meyer, who told her that defendants would raise the money to pay her at the rate of $25 a week. This was reported to the other members. She continued her work and was paid by Mr. Meyer $25 on account. Mr. White told her that she should not get impatient, that she would get her money. Some of the stockholders gave testimony contradicting the plaintiff in some particulars. The variant stories were properly submitted to the jury, and this court cannot say that the conclusion favorable to plaintiff's version is so manifestly against the weight of the evidence as to require a reversal.

It was not error under the circumstances to permit plaintiff to testify as to her conversation with White. While as a general rule an agency cannot be proved by the statement of the person claiming to be an agent, yet here it is conceded that White was the attorney of defendants' association authorized to represent it in litigation, and his authority to incur the necessary expenses would be implied. Any question, however, as to his authority to bind defendants is removed by the evidence showing their ratification of his action in employing plaintiff.

The court properly refused to permit defendants to deny

that White had authority to hire the plaintiff; (Hoffman v. Tosetti Brewing Co., 167 Ill. App. 291); conversations between defendants at which plaintiff was not present were inadmissible.

Criticism is made of some of the instructions given, but these are not misleading and defendants' refused instructions are covered by others.

The jury brought in a verdict for $350, which did not take into account a credit of $27 to which plaintiff had testified. She therefore entered a remittitur of this amount and judgment was entered accordingly. This is less than the sum claimed in plaintiff's declaration and we do not see how defendants can complain because of this.

The determination of the case really hinges upon the opinion of the jury upon the testimony of the witnesses. Apparently this is the second jury which has favored the plaintiff in this case, and we would not be justified in setting aside its verdict; the judgment is therefore affirmed.

AFFIRMED.

Holdom, P. J., and Dever, J., concur.

240 - 26012

W. A. L. THOMSON,
Appellant,

vs.

CHARLES H. PERRY,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF COOK COUNTY.

220 I.A. 635

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit claiming to be the owner and holder of a note made by the defendant, and is seeking to recover the amount of same with interest. On trial by the court finding was against plaintiff and judgment was entered accordingly, from which he appeals. The note was dated April 12, 1909, for three hundred dollars with interest at six per cent, due four months after date to the order of the Interurban Electric Light & Power Co. Its execution by defendant and the consideration are not in dispute.

Plaintiff testified that the note was discounted by him for the payee about the middle of July, 1909; that it was still in his possession and unpaid, although repeated requests had been made of defendant for payment. George F. Schoenberger, president of the Interurban E. L. & P. Co., testified that plaintiff was the owner of the note and had discounted it for the company about the middle of July, 1909. This was corroborated by Edwin Schoenberger, treasurer of the company at the time of the alleged transfer to plaintiff, who testified that acting under instruction from his father, George Schoenberger, he sold it to plaintiff about the middle of July. As a defense, defendant introduced evidence tending to show that he had paid the amount of this note on July 27, 1909, to George Schoenberger and received a receipt. This contains a recital

that the payment is made "on acct. note due Aug. 12/09, same to be taken up by the company when due." We do not find any contradiction of the testimony of plaintiff or of the president and the treasurer of the Interurban R. L. & P. Co. as to the transfer of the note to plaintiff before the date of defendant's payment. The language of the receipt given to the defendant tends to support plaintiff's version. It indicates clearly that the Interurban company did not have the note in its possession at the time defendant made the payment, but the company undertook to get the same when it fell due. Under such circumstances plaintiff constituted the company his agent for the purpose of securing the note when it matured, and delivering it to him. If the company failed, it must be held to be the failure of defendant's agent.

It is established in many decisions that where a person pays a note to one not its holder, he does so at his peril, and if he fails to demand or receive the note he must suffer the possibility of being compelled to pay it again. Kobley v. Ryan, 14 Ill. 51; Bonner v. Hodson, 134 Ill. 32; McNamara v. Clark, 85 Ill. App. 439; Clarke v. Hunter, 83 Ill. App. 100.

We are of the opinion that the finding of the trial court was against the weight of the evidence, and as the result was apparently because of a misapprehension as to the law, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Holdom, P. J., and Dever, J., concur.

313 - 26085

HENRY G. HART,
Appellant,

vs.

MARCUS S. OLIVER,
Appellee.

APPEAL FROM COUNTY COURT OF
COOK COUNTY.

220 I.A. 635[3]

MR. JUSTICE MOSURMLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover compensation for damages said to have been inflicted upon plaintiff's automobile by reason of the negligent operation by defendant of his automobile causing a collision. The verdict of the jury was favorable to defendant and judgment was accordingly entered, from which plaintiff appeals. In view of our conclusion that prejudicial errors occurred upon the trial, we shall not comment upon the occurrence.

Over the objection of the attorney for plaintiff and permitted by the court, testimony was given tending to show that plaintiff had been reimbursed by an insurance company for the damages to his car. The record does not support the contention that this was first brought out by the attorney for plaintiff. Defendant's attorney emphasized this by repeated questions and although the court sustained an objection in one instance, at another time a witness was permitted to state that "The check was made out by the insurance company," followed by the question of defendant's attorney, "What insurance company?" and upon objection thereto the court ruled, "He may answer." The fact that an accident insurance company has insured either of the parties in a case of this kind is immaterial and evidence thereof is incompetent. It has been held many times that suggestions upon the trial that a party is insured is ground for reversal. Among the many

cases so holding are, McCarthy v. Spring Valley Coal Co., 232 Ill. 473; Iroquois Furnace Co. v. McCrea, 191 Ill. 346; Volkmann v. Grossman, 129 Ill. App. 182; Eckhart & Swan v. Schaefer, 111 Ill. App. 500; Fiersema v. Lockwood, 147 Ill. App. 37; and Santarm v. Ideker Co., number 20541. opinion of this court filed March 8, 1926.

Complaint is made of the refusal of the trial court to give an instruction presented by plaintiff to the effect that in determining upon which side is the preponderance of the evidence the jury may take into consideration the number of witnesses testifying on one side or the other. We see no good reason why such an instruction should not have been given.

For the reasons above given the judgment of the County court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Holdom, P. J., and Dever, J., concur.

263 - 25521

GEORGE F. GOODNOW,
Appellee,

vs.

M. IRVING OSBORNE,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

220 I.A. 633

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee brought this suit upon appellant's promissory note for $35,000 dated February 1, 1913, payable on demand to appellant's order. Appellant pleaded the general issue and a failure of consideration. Plaintiff proved the execution and endorsement of the note by defendant, demand for its payment made May 2, 1917, the amount of principal and interest remaining due, and that the note was given in consideration for 350 shares of the capital stock of a certain corporation, which plaintiff transferred to defendant and which the latter delivered back as collateral to the note.

Over plaintiff's objection, but subject to his motion to strike the same, the court received evidence of negotiations had between defendant and plaintiff and stockholders of the company immediately preceding or contemporaneous with the execution and delivery of the note. At the close of defendant's case, the court, on the renewal of plaintiff's motion, struck out such evidence and also granted plaintiff's motion for a directed verdict. The evidence so stricken was to the effect that at or just prior to the execution of said note defendant entered into a verbal agreement with plaintiff

and other stockholders of the company whereby he was to undertake a disposition of their stock and create a market therefor, get the payment for the stock when and as sold, in the interim turn over to them the dividends paid on the unsold stock in place of interest on the note, and that pursuant to such arrangement the stock was transferred to him for which he gave his notes including the one in question.

Appellant contends that such evidence tended to sustain the special plea and so raised a question of fact for submission to the jury, and therefore it was error for the court to direct a verdict. If the premises are correct the conclusion follows. But if such evidence was properly stricken no disputed question of fact was left to go to the jury, and appellant fails to argue the main question, namely, whether the court was not justified in striking out the evidence adduced in support of the special plea.

But if appellant's argument may be construed as also directed against the alleged error assigned in excluding defendant's evidence, yet considered in the most favorable light to defendant his evidence consisted merely of a prior or contemporaneous parol agreement which varied the terms of a note, absolute on its face in requiring payment on demand, by showing that the note was not payable on demand, but only on condition of defendant's sale of the stock in question and accounting for the proceeds. Whether that was the understanding or not, the rule is well settled and has been repeatedly followed in this state, as well as in foreign jurisdictions, that the maker of a note cannot show against the payee an oral contemporaneous

agreement which makes a note absolute on its face payable on a contingency. It was so held in Ashlin v. Dwyer, 101 Ill. App. 335, following decisions of the Supreme Court referred to in the opinion. (See also Graff v. Fox, 204 id. 508; Bradley v. F. M. & D. Co., 208 id. 452; Hughes et al. v. Bourne, 117 Ill. 446; Harding v. Peck, 160 Ill. 175.) As the parol agreement to pay the note, not upon demand and only upon condition, was inconsistent with the written note, and could not be received to contradict or vary its terms, it was not error to exclude such proof, and as that left no evidence in support of the defense it was not error to direct the verdict.

While we do not think defendant's evidence in any event tended to support the defense pleaded, viz., a failure of consideration, yet it is needless to discuss it from that point of view, it having been properly excluded for the reason stated.

AFFIRMED.

Gridley and Matchett, JJ., concur.

278 - 28636

John E. Traeger, Sheriff,
for the use of LOUIS
MAGNUSSTONE,
Appellee,

vs.

JOE ADKIN,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

220 I.A. 635

MR. PRESIDING JUSTICE BAUMAN
DELIVERED THE OPINION OF THE COURT.

This is a suit against the surety on a replevin bond given to the sheriff of Cook County. The declaration alleges that the judgment in the replevin suit was against the principal on the bond, in the alternative form provided by statute, that he pay the amount found to be due with proper damages, or make return of the property.

The surety filed two pleas of nil debit, and also a plea of tender of the chattels so replevied and refused to accept them. When the case was called for trial, plaintiff, without demurring or replying, moved for judgment on the special plea because it admitted the alleged debt of $1756.44 was due. The motion was granted, and judgment was entered for such amount, reciting that it was based on such admission.

One of the errors assigned is in so entering judgment. The pleas could not be disposed of in such a manner. Plaintiff should have demurred or replied. Of course, the plea of nil debit was improper in an action of debt on a bond when the bond is the foundation of the action (1 Chitty on Pleading, 433; King v. Ramsay, 13 Ill. 619) but the plea of tender constituted a defense pro tanto of the action. (Harris v. Bardell, 36 Ill.

App. 374; Edwin v. Cox, 61 id. 367) and was not impaired by such admission. Because of the irregular disposition of the plea and the case, the judgment must be reversed and the cause remanded.

Appellee asks affirmance because of a faulty abstract. While it is subject to criticism for technical nonconformity with our rules it fairly presents the merits of the assignment of error considered.

REVERSED AND REMANDED.

Gridley and Mitchell, JJ., concur.

(47,100)

232 - 25540

STANISLAW ZAJKOWSKI and
FELIKSA ZAJKOWSKI,
Appellees,

vs.

WILLIAM and JOSEPHINE ADENT,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 635

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

In April, 1919, appellees sued appellants for $350 alleged to have been loaned to them February 21, 1919, on their promise to pay the same back on or before a month therefrom, with interest at 6 per cent per annum, and pleaded (unnecessarily) as evidence of the receipt of said sum the execution of a paper reading as follows: "Chicago, February 21, 1919. Pay to the order of Stanislaw and Feliksa Zajkowski, $200, $100, $50. (Signed) Jozefa Zajkowski, Wm. Adent."

Jozefa Zajkowski has since married Wm. Adent. Their affidavit admits the loan of such amount, but avers that it was not to become due and payable until February 21, 1920. It is further alleged in the affidavit that Wm. Adent did not sign such receipt but authorized Jozefa to obligate him to pay such amount in not less than one year after February 21, 1919. Feliksa alone testified for plaintiffs, and Jozefa for defendants.

The only thing Feliksa testified to bearing on the case was that the sums of $200.00, $50.00 and $100.00 appearing in an exhibit shown to her (which appears from the record to have been the receipt referred to in plaintiff's statement of claim) were written therein by her husband at different dates, viz., on February 21, March 10 and March 20, 1919, respectively.

This memorandum, so referred to in the case, was received in evidence. While it is not preserved in the bill of exceptions yet, without proof of anything further - even the signatures to it, its competency or relevancy under the pleadings are not apparent, and of itself it was insufficient to make out plaintiffs' claim as pleaded, and on such testimony alone plaintiffs rested their case. Josefa, testifying for defendants, admitted receiving the several amounts on the dates so testified to by Feliksa, but said there was an agreement that they were not to be paid for a year and that plaintiffs never demanded payment of the amount before the suit was begun. This was all the material evidence on either side going to the real issue in the case, viz., whether payment of the sums alone was due at the time the action was brought. The court then suggested that the defendants give security. They declining to do so the court said: "All right; judgment for $350.53."

There was no attempt on the part of the plaintiffs to prove the averment in their statement of claim that such sums were to be paid in a month or, in fact, to prove anything except that the money was loaned, a fact that was admitted in the pleadings. On the contrary, the proof for defendants not only sustained their affidavit of defense but it was not disputed, and according thereto the right of action for the amount loaned had not accrued at the time the suit was begun. The finding and judgment of the court, therefore, were not sustained by the evidence. Accordingly the judgment must be reversed. This reversal does not deprive plaintiffs of the right to another action to collect the sum loaned, which the record discloses is now due. But this reversal ends the present action.

REVERSED WITH FINDING OF FACT.

Gridley and Hatchett, JJ., concur.

282 - 25540

FINDING OF FACT.

We find that the sum sued for herein was not due at the time the action was brought.

(7722)

290 - 25548

ALBERT CADA, Appellee,

vs.

JAMES SACK, Appellant.

APPEAL FROM COUNTY COURT, COOK COUNTY.

220 I.A. 636

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an action of assumpsit originally brought against James Sack and Amalie Sack on the common counts and a special count setting up both a written contract and a subsequent verbal contract for work and material and the promises of both defendants to pay therefor. To the declaration they joined in a plea of general issue. Later Amalie Sack was dismissed out of the case and the declaration amended to conform thereto. But still later, after the evidence was in, plaintiff again amended his declaration naming both James and Amalie Sack as parties defendant. On motion the former joint plea stood to the same. The verdict and judgment were against James Sack only. But the judgment cannot stand. As said in Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61: "It is undoubtedly the general rule that, where two defendants are sued jointly and served with process, it is error to render final judgment against one of them without disposing of the case as to the other." (p. 76) The doctrine so laid down in that case and others there cited has been repeatedly followed in this court. (Hom v. Allen, 179 Ill. App. 223; Leisteko v. Smith, 190 id. 313; Sabath v. Vacek, 204 id. 306; Boyle v. Fallows, 209 id. 325.) In such a case

before recovery can be had against one defendant the other should be dismissed out of the case and the declaration amended by omitting the charge of joint liability. (See authorities last cited.) It is unnecessary to consider the other errors assigned. Accordingly the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Hatchett, JJ., concur.

(14702)

302 - 25560

WALTER W. ALWART,
Appellee,

vs.

BLACK & WHITE CAB COMPANY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 636

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages to appellee's automobile as a result of a collision with one of appellant's automobiles, in which judgment for $150 was rendered in favor of plaintiff on the findings of the court. The evidence discloses that the collision took place on a rainy night at the crossing of Clark and Addison streets. Clark runs north and south, and Addison east and west. Plaintiff was driving north on the east side of Clark and defendant west on the north side of Addison. They collided a little northeast of the center of the crossing. The evidence is so conflicting with reference to the exercise of care by either party that we are not disposed to disturb the court's findings as manifestly against the weight of the evidence, it depending largely upon the credibility of the witnesses.

Error is assigned in assessing the damages on the ground that the witness testifying thereto did not qualify as an expert. We think his evidence showed sufficient familiarity with the cost of materials which went into the repairs sued for to justify its being received. The judgment will be affirmed.

AFFIRMED.

Gridley and Matchett, JJ., concur.

(1774a)

346 - 25606

GARDINER METAL COMPANY, a corporation, Appellee, vs. AMERICAN STEEL SPRING COMPANY, a corporation, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

220 I.A. 636 3

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit on a promissory note in which an attachment in aid was sued out on plaintiff's affidavit setting up as ground therefor (1) that defendant corporation is not a resident of this state, and (2) that defendant is about fraudulently to conceal, assign and otherwise dispose of its property or effects so as to hinder or delay its creditors. Plaintiff made out a prima facie case in support of its declaration, and defendant offered no evidence to support its plea thereto of the general issue. The merits of the judgment entered on a directed verdict for the plaintiff are not questioned. The only question presented arises on defendant's plea to the writ of attachment and the affidavit therefor. A demurrer to the plea was sustained and defendant elected to abide by the plea, which traversed the first alleged ground for the attachment but not the second. Therefore not being a complete traverse of the affidavit it was fatally defective, (McFarland v. Claypool, 128 Ill. 397, 402) and hence the demurrer was properly sustained, and the judgment must be affirmed.

Appellant and appellee seem solicitous, in view of the contradictory decisions cited, that we should decide

whether the first ground of the attachment was well-founded, which presents the question whether a foreign corporation licensed to do business in this state and having offices in this state for the transaction of such business, is a resident thereof within the meaning of the Attachment Act. As the demurrer was properly sustained regardless of the claim of non-residence, a discussion of the point is unnecessary.

Appellee refers to the fact that there was no appeal bond. It does not, however, move for a dismissal of the appeal, but, on the contrary, presses consideration of the questions raised thereon, as manifestly contemplated when it entered into a stipulation in the court below for other security than an appeal bond pending the appeal. Under such circumstances we think, as said in Sherwood v. Illinois Trust & Savings Bank, 195 Ill. 112, 121, appellee "must be held to have waived a provision that the statute says was for his benefit."

AFFIRMED.

Gridley and Matchett, JJ., concur.

355 - 25615

STANDARD SCREEN COMPANY,
Appellee,

vs.

WILLIAM J. REINHOLD et al.,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

220 I.A. 636

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree establishing a mechanic's lien. The controlling question is whether the lien was waived. The master to whom the case was referred found that it was not, and the chancellor confirmed his report. Exceptions thereto were overruled and present such question.

Appellee (complainant to the bill) entered into a written contract with one Anderson, the then owner of the premises in question, (which have since been conveyed to Mr. Reinhold, one of the defendants to the bill, and who with his wife are the appellants herein) to provide all the materials and work for furnishing the window shades, screens, curtain rods and drapery poles for Anderson's building at the northeast corner of Mildred and Marianna streets, Chicago, for prices as follows: Screens $456; shades $427; curtain rods $185; drapery poles $59, aggregating $1127. After the last three named classes of articles were furnished the same were paid for at the contract price of $671 by Anderson's loan agent, Peabody, Houghteling & Company, on his order. Such loan agent took complainant's receipt therefor which provided for a waiver, and also a waiver executed by complainant, which reads as follows:

"Chicago, May 29, 1917.

To all whom it may concern:

We, the undersigned, Standard Screen Company, have been employed by Martin Anderson to furnish window shades and rods for the building known as northeast corner of Mildred and Mariana St.

Now therefore, know ye that we, the undersigned for and in consideration of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, do hereby waive and release any and all claim, lien or claim of right of lien on said above described building and premises under an Act to Revise the Law in relation to Mechanic's liens, approved May 18, 1903, and in force July 1, 1903, on account of labor or materials or both, furnished or which may be furnished by the undersigned to or on account of said Martin C. Anderson for said building or premises.

Given under our hand and seals this 30th day of May, 1917.

Standard Screen Company (Seal)
A. Goldberg, Sec."

Between June 5 and October 20 the same year, complainant furnished the labor and material for the screens provided for in the contract, and in October sought payment of the owner Anderson. He having no money and having exhausted his loan gave a note for $456, the price of the screens. While appellant contends that such note was accepted as payment of the sum due therefor, and there was evidence to support that contention, it need not be discussed if there was a waiver, as we think, of the lien, for that of itself would dispose of the merits of the bill.

It will be observed that the waiver agreement expressly waives any lien under the Mechanic's Lien Act then in force "on account of labor or materials or both, furnished or which may be furnished" by complainant to or on account of said Anderson "for said building or premises." There is no ambiguity in this language found in the operative part of the agreement. It is very explicit and does not require using the recital preceding it to disclose the real intention of the party. The rule in such a case is un-

questioned. As stated in Walker v. Tucker, 70 Ill. 527:

> "The rule of law applicable is, where the words in the operative part of an instrument are of doubtful meaning, the recitals may be used as a test to discover the intention of the parties, and fix the true meaning of those words; but where the words in the operative part of the instrument are clear and unambiguous, they cannot be controlled by the recitals."

(See also Burgess v. Badger, 124 Ill. 288, and Dunlop v. Lamb, 182 Ill. 319.) The only need of referring to the recital in said agreement is to identify the building. It is a well settled doctrine that the reciting part of an instrument is not a necessary part either in law or in equity, but as stated in said decision, may be made use of to explain the intention and meaning of the parties when the operative part raises any doubt with regard thereto. Nor can the recital control the operative part of the agreement. (7 Words & Phrases, 5998; Clark v. Best, 113 N. Y. 17; Monks v. Provident, etc., 64 N. J. Law, 89.) Further authorities need not be cited on this elementary proposition. Appellee, however, seeks to limit the waiver to the shades and rods mentioned in the recital but in its argument for such construction relies mainly on extrinsic facts and circumstances. But recourse cannot be had to them nor to such recital, when the written instrument, like this, is free from ambiguity. Accordingly the decree must be reversed and the cause remanded with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Matchett, JJ., concur.

359 - 25619

L. C. H. G. ZIEGLER,
Appellee,

vs.

ABE WAHLIN,
Appellant.

Appeal from
Municipal Court
of Chicago.

220 I.A. 636[5]

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

At a previous term this same cause came before us on an appeal from a judgment against the plaintiff, Ziegler. The judgment was reversed and the cause remanded without directions. As the case had been tried before a jury this court could not make a finding of facts in favor of the plaintiff even though on the evidence then produced he was entitled to a verdict, (City of Spring Valley v. Spring Valley Coal Co., 195 Ill. 497) and therefore on reversal and remandment without directions the cause stood in the court below precisely as if no trial had occurred. (Pratt v. Riley, 365 Ill. 534, 536.) But when the cause came up for trial after such remandment the court, without impanneling a jury or hearing any evidence, on plaintiff's motion found the issues for him and entered judgment for the amount claimed. This appeal is from that judgment.

The decisions cited by appellee in support of the court's action are those in which the appellate tribunal determined the issues and decided the questions involved upon their merits, and reversed and remanded with directions to proceed in conformity with the views expressed in the opinion. The mandate in the instant case merely reversed the judgment and remanded the cause for such other and further proceedings as to law and justice shall appertain. Under such a mandate it

was the duty of the court to impanel another jury, to which the defendant was entitled, as held in the Spring Valley Coal Co. case, supra, and retry the case upon the issues raised by the Pleadings. Accordingly the judgment will be reversed and the cause remanded for a trial upon such issues as are or may be raised under the pleadings.

REVERSED AND REMANDED.

Gridley and Mitchett, JJ., concur.

(12770)

26 - 25647

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

MICHAEL CLIFFORD,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

220 I.A. 637

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was tried upon an information charging him with an assault with a dangerous weapon and intent to inflict bodily injury upon one Al. Bebb. The verdict found the assault was upon the person of Alfred Bebb. On the ground that the verdict was not responsive to the information it is urged that it was error to deny the motion in arrest of judgment.

It is well settled law that to authorize a judgment against a defendant in a criminal case the verdict must respond to the issues and contain, either in itself or by reference to the indictment or information, every material element constituting the crime. (Donovan v. People, 215 Ill. 320; People v. Lemen, 231 id. 192.) This reference may be in a general form of verdict finding a defendant guilty in manner and form as charged in the indictment or information. But when it is attempted by the verdict to specify the elements of the crime as charged it must include every material element. (Id.) It is not questioned that in charging the offense described in said information it was necessary to designate the injured party, and that a verdict naming a different party would be fatal. (Million v. People, 6 Ill.

App. 537.) Unless, therefore, we can say by reference to the information that Alfred Bobb designates the same person as Al. Bobb named therein we must hold that the verdict is not responsive to it or the issues submitted.

The record contains no bill of exceptions, and it is urged for the People that in the absence thereof it will be presumed there was proof establishing the identity of Alfred Bobb with Al. Bobb. But the responsiveness of the verdict is not determined by the proof, but, as stated in the decisions cited, by reference to the indictment or information. Hence, cases cited by the People which present a question of variance between proof and pleadings are not applicable. Observing, therefore, the recognized test we are unable to say that the Alfred Bobb named in the verdict was the Al. Bobb named in the information, when it is well known that "Al." is a nickname for other names than Alfred. So far as this record is concerned there is nothing in it to prevent a second prosecution of plaintiff in error under the name of Albert, Alexander or some other name of which "Al." is frequently used as a contraction.

It is not a case for the application of the doctrine of idem sonans, as conceded by counsel for the People, nor one where any presumption can be entertained to support what on the face of the record is a verdict not responsive to the information.

While the enforcement of the rule above stated may seem in the instant case a purely technical application, we cannot disregard an established rule calculated to prevent a second prosecution for the same offense. The error could

have been easily cured by amending the information to conform to the verdict. It is better, therefore, to insist upon correct practice in a matter involving human liberty than to establish a precedent that might endanger it. The judgment will accordingly be reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

Gridley and Hatchett, JJ., concur.

(1478a)

15183

AGE - [illegible]

MARTHA C. [illegible], appellee,

vs.

MARSHALL FIELD & COMPANY, a corporation, appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

220 I.A. 637

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is a suit to recover damages for personal injuries alleged to have resulted from a breach of warranty of food served to appellee in appellant's tea room, an adjunct to its retail store. The parties will be referred to as designated in the trial court.

The declaration is in two counts, each predicating the cause of action on the breach of an express warranty and plaintiff's reliance upon the alleged promises and representations. As there was no proof whatever tending to support an express warranty defendant offered as evidence and moved in proper form for a directed verdict, which the court refused. The court also refused another instruction tendered by defendant, using substantially the same language of the declaration, to find for the defendant if the jury did not believe from the evidence that the defendant either before or after the time it furnished such food expressly promised and assured plaintiff or its patrons that "the articles of furnished food were good, or sound, or healthy, or wholesome food, or free from defects, or fit for human consumption." The second count averred that "defendant in its advertisements, placards, announcements and by other means promised and assured" etc.,

the quality of the food as set forth in the first count.

Defendant filed the plea of general issue and the plea of statute of limitations. Plaintiff offered no proof of any such alleged promises, "advertisements, placards or announcements", but relied, as she does here, on the doctrine that a restaurant proprietor impliedly warrants the soundness and wholesomeness of the food served its patrons and that the proof showed a breach of such warranty.

Conceding, however, for the sake of argument, the soundness of the doctrine, it cannot be invoked to support a declaration based like this on an express warranty. Plaintiff practically concedes that the declaration contains averments of an express warranty but takes the untenable position that they constitute surplusage. But even if they were eliminated the declaration would fail to state a cause of action on an implied warranty. It was incumbent upon plaintiff, therefore, to prove her case as averred and there can be no implied warranty where there is an express one as to the same articles. (Century Electric Co. v. Detroit Copper & Brass Rolling Mills, 234 Fed. 49; Thielman v. Reinch, 145 S. W. (Ark.) 835). It follows that in the absence of any proof tending to support the averments of an express warranty the court should have granted defendant's motion for a directed verdict, and the case having been submitted to the jury on plaintiff's raising the issue aforesaid, whether there was such a warranty and the verdict being against the evidence, we must reverse the judgment. This view of the case dispenses with the necessity of discussing any other points.

REVERSED WITH FINDING OF FACT.

Gridley and Hatchett, JJ., concur.

FINDING OF FACT.

We find that appellant, Marshall Field & Company, did not expressly warrant to appellee, Martha C. Gunderson, or its patrons, that the food furnished to her was of the quality as so warranted in the declaration.

(1479c)

253 - 26025

PEOPLE OF THE STATE OF ILLINOIS ex rel. MOSES HAREN, Appellee, vs. JOSEPH HUCIK, as Commissioner of Buildings of the Town of Cicero, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

220 I.A. 637 3

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from an order for a writ of mandamus to compel the commissioner of buildings of the Town of Cicero to approve certain plans for a building, and to perform other ministerial acts required in applying for a building permit.

The writ of mandamus is awarded only in cases where the party applying therefor shows a clear right to it as well as a clear legal duty on the part of the defendant to perform the act sought to be enforced, (People v. I. C. R. R. Co., 241 Ill. 471, 481) and relief will not be granted to a petitioner until he shows that he has a clear legal right which is denied, and that the denial of the writ affects his pecuniary interests. (People v. Masonic Benevolent Association, 98 Ill. 635.)

It does not appear from the evidence as abstracted that the relator had a personal or financial interest in the building for which the permit was sought. For aught that appears to the contrary his interest was merely that of an agent. Even if it can be said that there was any evidence on the subject to go to the jury it was not sufficient to show the denial of any right of the relator.

But the case having been submitted to the jury a new trial should have been granted, for the court erred in refusing to give an instruction, tendered by defendant, to the effect that it must appear from the evidence that the relator is the real party in interest before he will be entitled to the issuance of the writ. Accordingly the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Hatchett, JJ., concur.

255-25511

(Mec)

ROCKWELL LIME COMPANY,
a corporation,

Plaintiff and Appellee,

v.

JOHN FRLICKA, MARIE FRLICKA, his wife, and JAMES KARBOU, administrator of the estate of John Jaros, deceased,
Defendants.

APPEAL FROM
COUNTY COURT
OF COOK COUNTY.

On appeal of JOHN FRLICKA and MARIE FRLICKA,

Appellants.

220 I.A. 6374

MR. JUSTICE GRIDLEY delivered the opinion of the court.

By this appeal appellants seek to reverse a judgment rendered jointly against them and James Karbou, administrator of the estate of John Jaros, deceased, in the county court of Cook County on July 3, 1919, for $216.83, in an action in assumpsit. The action, based upon section 28 of the Mechanic's Liens Act, was commenced on August 24, 1917 against said defendants. Subsequently George Kapilla was made an additional defendant. The case was tried before the court without a jury. At the conclusion of the trial plaintiff dismissed the suit as to said Kapilla, and the court found the issues against said remaining defendants and assessed plaintiff's damages at the sum of $216.83, and entered the judgment appealed from. No appearance has been entered here by appellee, and we have not been favored with a brief and argument in its behalf.

It appears that on February 26, 1917, appellants, being the owners of certain premises, situated in Cook County, Illinois, entered into a written contract with said Kapilla wherein the latter agreed for a certain consideration to provide all material and labor necessary to erect and fully complete by May 15, 1917, a building on said premises according to certain plans and specifications; that the building was erected; that said John Jaros

in his lifetime was employed, as sub-contractor, to do certain plastering work in the building which he did; and that at Jaros' request plaintiff delivered to the premises certain plastering material to the value of $216.83.

In said section 28 of the Mechanic's Liens Act provision is made for suing the "owner and contractor jointly" and rendering a personal judgment "as in other cases", and it is further provided that

"All suits and actions by sub-contractors shall be against both contractor and owner jointly, and no decree or judgment shall be rendered therein until both are duly brought before the court by process or publication, x x. All such judgments, where the lien is established, shall be against both jointly, but shall be enforced against the owner only to the extent that he is liable under his contract as by this Act provided, and shall recite the date from which the lien thereof attached according to the provisions of sections one (1) to twenty (20) of this act; but this shall not preclude a judgment against the contractor, personally, where the lien is defeated."

We are of the opinion that the judgment cannot stand for at least two reasons. In the first place, the judgment is a general one and rendered jointly against the "defendants", who are the owners of said premises, and the administrator of the deceased sub contractor. The former must be charged de bonis propriis; and the latter de bonis testatoris. Such different judgments cannot be rendered in the same case. (Eggleston v. Buck, 31 Ill. 254, 258.) "The judgment cannot be joint, because one is liable personally, the other in his representative capacity, to the extent of assets in his hands." (Ballance v. Samuel, 3 Scam. 380, 383.) In the second place, by the provision in said section 28 the judgment should recite the date from which the lien attached. No such recitation appears in the judgment appealed from, and this is ground for reversal. (Zechman v. Feigenbaum, 163 Ill. App. 366, 368; Dowsma v. Krueger, 205 Ill. App. 609, 610.) Other points are made and argued by counsel for appellants but it is unnecessary to consider them. The judgment of the county court is reversed and the cause is remanded.

REVERSED & REMANDED.

BARNES, P.J., and MATCHETT, J., concur.

352 - 25612

SAMUEL GROSSMAN, as assignee of CHANDLER LUMBER CO., a corporation, Appellant,	)	APPEAL FROM
v.	)	SUPERIOR COURT
HENRY E. JOHNSON, JESSIE JOHNSON, ANNA MALTZ, JOHN E. ERICKSON, and ALMER J. JOHNSON, Appellees.	)	OF COOK COUNTY.

220 I.A. 638

MR. JUSTICE GRIDLEY delivered the opinion of the court.

By this appeal Samuel Grossman, complainant, seeks to reverse a decree of the Superior Court of Cook County, dismissing his bill and supplemental bill for want of equity.

The original bill, a creditor's bill, filed December 13, 1917, made said Henry E. Johnson, Jessie Johnson, his wife, and Anna Maltz defendants and prayed for an answer under oath and for such relief as is usual in bills of that discription. Complainant alleged in substance, that on October 9, 1913, the Chandler Lumber Co., a corporation, recovered a judgment for $863.60, in the Municipal Court of Chicago, against said Henry E. and Jessie Johnson, that execution was issued thereon and returned unsatisfied, and that said judgment remains in full force and effect; that on December 12, 1917, said judgment was duly assigned for value by said Chandler Lumber Co. to complainant, that said Henry E. and Jessie Johnson have property, equitable interests or things in action belonging to them which they keep concealed, or of which the title is held by others in trust for them, and which complainant cannot reach by execution; and that said Anna Maltz has property in her name and control, subject to some lien, in which said Henry E. or Jessie Johnson have some equity of redemption or other valuable interest.

To said bill Anna Maltz filed her sworn answer in

which she alleged in substance that in a certain suit in equity pending in the Circuit Court of Cook County, wherein it was sought to establish a mechanic's lien against certain real estate owned by her, said Henry E. Johnson had filed an intervening petition in which he also claimed a mechanic's lien against said real estate; and that in said suit a master in chancery had filed a report recommending that a decree be entered granting him such a lien in the total sum of $1409.97.

To said bill, also, said Henry E. and Jennie Johnson filed their sworn answer in which they denied having any property concealed or of which the title is held by others in trust for them, denied having made any fraudulent conveyances or transfers of property to any one so as to hinder or delay their creditors, denied that said Anna Maltz had property in her name or control in which they had any valuable interest, denied that said Anna Maltz was indebted to said Henry E. Johnson and denied that they had any property other than what was by law exempt from execution; and alleged, inter alia, that said Henry E. Johnson did have a mechanic's lien claim upon said real estate of said Anna Maltz which had been sustained; that on December 3, 1917, (i.e., before said Chandler Lumber Co. assigned said judgment to complainant) he had made an assignment of said lien claim for a valuable consideration to Almer J. Johnson and John E. Erickson, and that since July 18, 1917, they have been and now are the bona fide owners thereof. No replication was at any time filed to said sworn answer.

The cause was referred to a master to take proofs and report conclusions of law and fact. After the taking of much evidence the master filed his report recommending that said original bill be dismissed. The master found as facts, that said judgment of the Chandler Lumber Co. against said

Henry E. and Jessie Johnson had been assigned to complainant, Crossman, on December 12, 1917; that on December 3, 1917, a decree was entered in said Circuit Court sustaining a mechanic's lien claim in favor of said Henry E. Johnson on certain real estate owned by said Anna Malta in the sum of $1409.97; that on July 15, 1917, said Henry E. Johnson assigned to Almer J. Johnson and John E. Erickson all his right and interest in and to said lien claim, then on file in the office of the clerk of said Circuit Court; that on December 3, 1917, said Henry E. Johnson assigned and conveyed to said Almer J. Johnson and said Erickson all his right and interest in said lien claim as on that day decreed; that said assignments were made for valuable considerations; that the consideration of the assignment to said Erickson was the latter's claim of $540 for legal services rendered said Henry E. Johnson, and that the consideration of the assignment to said Almer J. Johnson was for money loaned and advanced from March 15, 1916 until December 3, 1917, amounting to more than $1500; that there is due and owing to said Erickson for legal services performed prior to the filing of said original bill herein on December 15, 1917, said sum of $540, secured by said assignments, which gave to said Erickson a valid lien upon the proceeds of said lien claim and decree; that there is due and owing said Almer J. Johnson a sum in excess of $1500, and that said assignments gave him a valid lien upon said lien claim and decree; that there was no fraud or attempt to conceal assets or to hinder or delay creditors by said Henry E. or Jessie Johnson by reason of said assignments; and that said complainant, Crossman, has not made discovery of any assets, or real or personal property, belonging to said Henry E. or Jessie Johnson from which to satisfy said judgment. The master also found in his "findings of law" that the lien of said

judgment was a general lien and did not create a specific lien against said mechanic's lien claim of said Henry E. Johnson; that the assignment of said judgment to complainant, Grossman, on December 12, 1917, conveyed to him only such rights and interests as were possessed by the assignor, Chandler Lumber Co., and that the lien of said judgment at the time of said assignment did not attach to said mechanic's lien claim or decree in favor of said Henry E. Johnson; that said joint assignments gave a valid lien upon said lien claim and decree to said assignees; and that said assignments were bona fide and not tainted with fraud; that said Erickson is not entitled to a claim for services and expenses incurred subsequent to the date of filing the original bill herein; that the equities of the case are with said Henry E. and Jessie Johnson; and that said Anna Maltz has no property or assets in which said Henry E. and Jessie Johnson have any interest or claim, to which the lien of said judgment could attach.

Objections to said report were ordered to stand as exceptions before the Superior Court, and on January 23, 1918, the court ordered that said report be in all respects approved and confirmed, but the court did not then dismiss said original bill but gave complainant leave to file a supplemental bill upon payment of all of defendants' costs then incurred.

On February 7, 1918, complainant filed his supplemental bill in which he made said Almer J. Johnson (son of Henry E. Johnson) and said John E. Erickson additional parties defendant, and to which were attached as exhibits said written assignments to them jointly of said right and interest in said mechanic's lien claim and decree. Both are signed by said Henry E. Johnson - the one dated July 15, 1917 and acknowledged

before a notary public on July 17, 1917, and the other dated and acknowledged on December 3, 1917. In said supplemental bill it is charged that "said assignments to Almer J. Johnson were made without any consideration whatever, x x and for the purpose of hindering, delaying and defrauding the creditors of said Henry E. Johnson, so as to place the aforesaid claim for mechanic's lien beyond the reach of those creditors", and as to complainant are void and of no effect; and that it appears from the evidence taken before the master that the assignments to said Erickson were made as security for his services rendered in said mechanic's lien suit, the reasonable value of which services, as found by the master, is $540. And complainant prayed that said assignments might be declared null and void as to said Almer Johnson as against complainant's rights, and that the interest of John E.Erickson under said assignments might be declared to be a security for the payment of his said fees in said mechanic's lien suit. To this supplemental bill separate answers were filed by said Almer Johnson and said Erickson.

On June 12, 1919, a hearing was had on said supplemental bill before the Chancellor. Complainant called as a witness said Almer J. Johnson (who had not been a witness on the hearing before the master on the original bill) and he was examined and cross-examined at great length. He was the only witness heard by the Chancellor. On June 18, 1919, the Chancellor entered the decree appealed from, dismissing both the original bill and supplemental bill for want of equity.

After a review of the evidence taken before the Master under the original bill, and of the testimony of Almer J. Johnson given in open court under the supplemental bill, we do not think that it satisfactorily appears that the assign-

ments in question were made with the fraudulent intent to hinder and delay creditors. It appears rather that they were made for the purpose of securing the ultimate payment of bona fide debts due from said Henry E. Johnson to the assignees. It is said in Union National Bank v. State National Bank, 168 Ill. 256, 264:

"A creditor has unquestionably the right to pursue his legal remedies against his debtor so long as he does so in good faith, and if he thus succeeds in obtaining priority, either by suit or by the voluntary act of his debtor, he is entitled to hold the advantage gained, even though the result may be to postpone or even defeat other creditors. Weber v. Mick, 131 Ill. 520. This court has long adhered to the doctrine that even an insolvent creditor may prefer one creditor to another, and that his motive for so doing, provided the preferred creditor has done nothing improper, cannot be inquired into. To render a preference fraudulent, both parties must concur in the intent to commit the wrong. x x Fraud will not be presumed, but must be proved like any other fact; and it must be proved by clear and convincing evidence, and the burden is upon the party alleging fraud."

The decree of the Superior Court of Cook County will be affirmed.

AFFIRMED.

BARNES, P.J., and MATCHETT, J., concur.

(1982a)

387 - 35527

CHERUBIMI JACOBUCCI, Appellant, v. GUGGENHEIM BROTHERS, a corporation, and JOHN NORBET, Appellees.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

220 I.A. 638

MR. JUSTICE GRIDLEY delivered the opinion of the court.

This action is for damages for an alleged malicious prosecution. On the trial, at the conclusion of plaintiff's evidence, the court, on June 21, 1919, instructed the jury to return a verdict finding the defendants not guilty. They did so, and the judgment appealed from against plaintiff followed.

The suit was originally commenced, December 26, 1917, against Guggenheim Brothers, a corporation, as sole defendant. On January 3, 1919, John Norbet was made an additional party defendant. Plaintiff's declaration was twice amended, and the defendants filed a joint plea of the general issue, and Norbet a special plea.

The amended declaration, consisting of one count, alleged in substance that the defendants, intending to injure plaintiff, on January 6, 1917, maliciously and without any reasonable or probable cause, appeared before Harry P. Dolan, one of the judges of the Municipal Court of Chicago, and by a complaint, executed in writing under oath by John Norbet, for himself and as agent of Guggenheim Brothers, charged plaintiff with receiving stolen property, to-wit: 189 pounds of pork loins and 46 pounds of pork of the value of $35, being the property of said Guggenheim Brothers, and upon said complaint caused a warrant to issue for the arrest of plaintiff and for bringing him before said judge of said Municipal Court, and by virtue of said warrant caused plaintiff to be arrested, taken into the custody of an officer of the law, and confined in the

Desplaines street police station, Chicago, on said day, from 10 o'clock a.m., until 5 o'clock p.m., and afterwards, on January 5, 1917, caused plaintiff to appear before said Judge Dolan and to be examined and to be kept in the custody of the court pending trial until January 18, 1917; that on said last mentioned day plaintiff waived a jury trial and pleaded not guilty and was found and adjudged not guilty and discharged; and that plaintiff was not guilty of the offense as charged against him, and by means of the premises has been greatly injured in his reputation and standing in the community, has undergone great anxiety and pain of mind, and has incurred expense, etc.

It appears in substance from plaintiff's evidence that the plaintiff, Jacobucci, in December, 1916, was engaged in business in Chicago as a retail butcher; that the defendant, Guggenheim Brothers, a corporation, (hereinafter referred to as Guggenheim) was engaged in selling meats at wholesale in Chicago; that the defendant, John Norbet, was employed by Guggenheim as a salesman's helper; that one W. J. Hogan was also employed by Guggenheim as manager; that one Charles Klohr was also engaged in business in Chicago as a retail butcher, and that he had in his employ a young man, named Jacob Coren, as wagon boy; that on December 31, 1916, Guggenheim sold the pork in question to Klohr; that on said day Norbet delivered said pork at Guggenheim's place of business to Coren, who took it away in Klohr's wagon and sold it to Jacobucci for cash and embezzled the proceeds; that during said month of December, 1916, Coren procured other meats and merchandise of various other wholesale dealers, representing that said merchandise was purchased on Klohr's account, and also sold the same to various other parties and embezzled the proceeds; that on January 4, 1917,

officer Dennis Cresdon of the Desplaines street police station, after a search of several days, arrested Coren on the complaint of Klehr, charging embezzlement, and Coren made a confession, naming a number of persons, including Jacobucci, to whom he had sold meats and merchandise belonging to Klehr; that on the same day Cresdon called on Jacobucci and the latter admitted buying from Coren the pork in question, through an employee of his, Maurice Persin; that on Friday, January 5th, according to Cresdon's testimony, he called on Hogan, Guggenheim's manager, and informed him of Coren's confession and of Coren having sold the pork in question to Jacobucci; that Hogan replied that he knew Jacobucci and wanted no trouble with him but wanted pay for the pork; that Cresdon then said that if Guggenheim would not prosecute, another wholesale meat dealer would, and asked Hogan if he would have a man present when the case was called; and that Hogan replied that he would; that on Saturday morning, January 6th, Cresdon again called on Jacobucci and arrested him, without a complaint having been filed by anyone or without a warrant for his arrest having been issued; that Jacobucci was confined in said Desplaines street station until early in the afternoon of that day when he was released upon a bond prepared by his attorney, although it does not appear that up to this time any complaint had been filed by anyone against him; that, according to Cresdon's testimony, his arrest of Jacobucci was based upon Coren's statement to him (Cresdon), and that neither Norbet nor Guggenheim had anything to do with that arrest; that on Monday morning, January 8th, Norbet, in response to a telephone request of Cresdon to Guggenheim that Guggenheim send over someone to identify Coren, went to said police station, identified Coren as the man to whom he had delivered the pork, and, on Cresdon's request, signed and made affidavit to two complaints

one against Coren, charging him with having fraudulently obtained said pork by false pretenses, and the other against Jacobucci, charging him with having received said pork well knowing that the same had been stolen; that Norbet testified that he was uneducated and unfamiliar with the English language and could only read or write a few English words pertaining to the meat business, that he signed the complaints solely because he was asked to, that when he signed the complaint against Jacobucci the same was not read to him and he did not know and was not informed that he was charging him with receiving stolen property, and that he had no grievance against him and did not want him arrested or put in jail; that on January 10th, the case against Jacobucci was heard by Judge Delon and after a full hearing he was discharged; and that Hogan testified that Guggenheim made no attempt to get Jacobucci to pay for said pork which Guggenheim had sold to Klehr and that Guggenheim had nothing against Jacobucci and did not want him arrested.

Under the facts disclosed, we are of the opinion that the action of the trial court in the present suit, in instructing the jury to return a verdict finding both Guggenheim and Norbet not guilty and in entering the judgment appealed from, was proper. It appears that the police officer, Creedon, rather than either Guggenheim or Norbet, was the real prosecutor of Jacobucci; that neither Guggenheim nor Norbet desired his arrest; and that two days after he had been arrested by Creedon and temporarily released, Norbet, at Creedon's request, signed the complaint against Jacobucci, the purport and effect of which he did not know, being unable to read it, and was not informed thereof. It does not appear that

Guggenheim authorized Herbst to sign the complaint or subsequently ratified that act. And even on the theory, which is unsupported, that both Guggenheim and Herbst caused his arrest and confinement there was not any evidence of malice or improper motives on their part, nor sufficient evidence of want of probable cause. "If malice and want of probable cause do not concur the action cannot be maintained, and it was for the plaintiff to show that there was not probable cause nor reasonable ground for the prosecution." (Glenn v. Lawrence, 260 Ill. 581, 587; Israel v. Brooks, 23 Ill. 575, 577.)

The judgment of the Circuit Court is affirmed.

AFFIRMED.

BARNES, P.J., and MITCHELL, J., concur.

383 - 25643

(171 Sw)

EDWARD R. GARDNER, for use of ESTELLE GARDNER, Appellee, v. KINNEY-ROME COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

220 I.A. 638

MR. JUSTICE GRIDLEY delivered the opinion of the court.

A judgment having been rendered in the Municipal Court of Chicago against Edward R. Gardner in favor of Estelle Gardner, and an execution thereon having been returned unsatisfied, she, on May 5, 1919, instituted garnishment proceedings against the Kinney-Rome Company, and that corporation subsequently filed an answer in which it denied owing any money to Edward R. Gardner or having any property of his in its possession or control. Leave was given Estelle Gardner to contest said answer, and the cause subsequently came on for trial before the court without a jury and evidence was then introduced. On July 3, 1919, the court found the issues against the garnishee and that it owed Edward R. Gardner the sum of $240, and entered judgment against said garnishee in said sum. The garnishee prayed an appeal to this Appellate court which was allowed upon filing a bond of $300 within 30 days and the garnishee was allowed 60 days in which to file a bill of exceptions. The appeal was perfected by the filing of a bond within the required time, which bond was approved by the trial judge. Subsequently, on September 18, 1919, a "correct statement of facts appearing on the trial of the foregoing case", etc., was signed and approved by the trial judge, nunc pro tunc as of August 28, 1919, on which last mentioned date said statement of facts was presented to another judge of said Municipal Court and signed by him as being so presented. On

October 8, 1919, the transcript of the record was filed in this Appellate court.

On January 13, 1920, the appellee filed a written motion in this Appellate court asking that said statement of facts be stricken from the record and that the judgment of the trial court be affirmed. Suggestions in opposition to the motion were filed, and on January 15, 1920, this Appellate court ordered that the motion to strike be allowed and that the motion to affirm the judgment be reserved to the hearing.

We have examined the common law record before us and find no error therein, and, as it is to be presumed that sufficient evidence was heard on the trial to warrant the finding and judgment, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

BARNES, P.J., and MATCHETT, J., concur.

(14440)

390 - 28081

LAURA Mc NEAL,

Appellee,

v.

CHICAGO CITY RAILWAY COMPANY, et al.,

Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

220 I.A. 638

MR. JUSTICE GRIDLEY delivered the opinion of the court.

This is an appeal from a judgment for $2250, rendered after verdict by the Circuit Court of Cook County in favor of Laura McNeal, plaintiff, and against the defendants, in an action for damages for personal injuries sustained by her while alighting from a west-bound street car of defendants on 35th Street at the intersection of Dearborn street in the city of Chicago.

Plaintiff's declaration consisted of four counts. During the trial the 3rd count was withdrawn from the jury's consideration. The 1st count charged in substance that while plaintiff, a passenger on the car and in the exercise of due care, was "about to alight" from the car at said intersection, the defendants so negligently operated it that she was thrown off and upon the ground and greatly and permanently injured. The 2nd count charged in substance that, after the car had stopped at said intersection and while plaintiff was "in the act of alighting" from the car, the defendants negligently started it "with a violent jerk", by means whereof she was thrown off, etc. The 4th count charged in substance that, after the car had stopped at said intersection for the purpose of allowing plaintiff and other passengers to alight therefrom and while plaintiff was "in the act of alighting" of which defendants had notice, said defendants negligently started and moved the car "before plaintiff had a reasonable opportunity

to get off," by means whereof plaintiff was thrown off, etc.

The accident happened about seven o'clock on the evening of Sunday, July 8, 1917. Plaintiff was about 54 years of age, by occupation a laundress, and was returning to her home. The usual stopping place for west-bound cars on 22th street was on the east side of Dearborn street. On the northwest corner of the intersection of the two streets was a drug store, and west of the drug store was a grocery store. After the accident plaintiff was carried into the drug store and from thence upstairs to the office of Dr. Kelly, (plaintiff's witness) who, upon examination of plaintiff, found a bruise in the occipital part of her head and a slight tearing of the skin. He dressed and stitched the wound. He also found an abrasion on the left arm and a fracture in the left elbow of the bone commonly called the crazy bone. He placed the arm in a position of rest and plaintiff was taken to the Cook County hospital, where she remained five weeks. After her return from the hospital Dr. Kelly further testified that he again saw her, removed the stitch and found no infection; that he found some deformity in the arm and a limitation of motion and that neuritis existed; that he subsequently treated her arm about six times and reduced the deformity and the limitation of motion; that he last treated her on September 22, 1917; and that the reasonable charges for his services would be $35. At the time of the trial in April, 1919, Dr. Kelly again examined her arm and further testified that he still found some limitation of motion, in that she could not extend the arm completely and that the muscles were atrophied from non -use; and that in his opinion the stiffness might be remedied by the gradual use of the elbow. No other physician was called to testify

as to plaintiff's condition either before or at the time of the trial. Plaintiff testified that at the time of the accident she received $1.60 per day for her work as a laundress, and did a full day's work, and that she has not worked since that time.

On the question of defendants' liability there was a sharp conflict in the evidence. On plaintiff's behalf she and two witnesses of the accident testified. On defendants' behalf five witnesses, including the motorman and the conductor on the car, testified. The main issues of fact were: Did the car come to a stop to permit the plaintiff to alight, either on the east or west side of Dearborn street, and start again while she was in the act of alighting and before she had a reasonable opportunity to get safely off? Or, was plaintiff herself guilty of negligence in attempting to alight from the car while it was in motion? Plaintiff testified in substance that as the car was approaching Dearborn street from the east she was in the front part of the car, got up from her seat and went to the front of the car by the motorman; that the car "had stopped and he opened the door for me to get off"; that when she was getting off, "the front of the car was right about on the line with the sidewalk on the east side of Dearborn street"; that as she was getting off, she took hold of something, put her right foot down on the step and then her left foot on the step, and after she had put her right foot on the ground and had started to put her left foot down, the car "jerked right off", and she fell backwards with her head to the west and on her left arm and back, and then became unconscious and did not know anything until she found herself in the doctor's office.

Thomas Moore, plaintiff's witness, testified in substance that he was walking east on the north side of 35th street, just west of Dearborn street; that when he first noticed the car it was standing on the east side of Dearborn street and two or three persons were getting off from the front platform; that then he saw the car moving west and plaintiff falling from the car; that when she fell the car was about in the middle of Dearborn street; and that after plaintiff fell somebody called out and when the car again stopped its rear end had just passed the door of the drug store. Howard Shaw, plaintiff's witness, testified in substance that he was walking west on the north side of 35th street, just west of Dearborn street; that the car stopped on the west side of Dearborn street and passengers alighted both from the rear and the front platforms; that plaintiff attempted to alight from the front platform preceded by two or three other persons; that the car started when plaintiff, "facing east and getting off backwards", had one foot on ground and the other on the step; and that as the car moved it seemed as if "her foot got caught someway" and she fell to the west "straight out on the pavement." Defendants' theory of the case supported by its witnesses, was that the car did not stop at its regular stopping place on the east side of Dearborn street and that plaintiff attempted to alight from the rear platform of the car while it was in motion and after it was west of Dearborn street.

We cannot agree with the main contention of defendants' counsel that the verdict is so contrary to the manifest weight of the evidence, both as to the question of defendants' negligence and the question of plaintiff's contributory negligence, as to warrant this court in reversing the judgment with a finding of fact.

Defendants' counsel also urge, as grounds of reversal, (1) that plaintiff "manipulated her arm" in the jury's presence; (2) that the court erred in refusing to give a certain instruction offered by defendants, marked "Refused No. 4", and also erred in giving instruction, No. 12, offered by plaintiff; (3) and that the damages are excessive.

As to the first contention it appears that during the trial plaintiff was allowed by the court to exhibit her left arm to the jury; that after she had done so her attorney, who was conducting her direct examination as a witness, said: "Move it around, Mrs. McNeal; shut your arm up tight; straighten your arm clear out." The objection to this procedure, being instantly made by defendants' attorney, was sustained by the court. Defendants' counsel here argue that "while it may have been discretionary with the court to permit plaintiff to show her arm to the jury so that they could see if there were any visible marks, wounds or deformity, yet it was highly prejudicial for the plaintiff to manipulate the arm in the presence and view of the jury, thus having an opportunity of simulating." It is a sufficient answer to the contention and the argument that the record before us does not disclose that any attempted manipulation of her arm was actually made by the plaintiff before the jury.

As to the alleged errors in the instructions we do not think that the court erred in refusing to give the instruction mentioned, offered by defendants. While the instruction is seemingly proper, we think the substance of it was sufficiently covered by other given instructions. The court gave sixteen instructions in all- three as offered by plaintiff

and thirteen as offered by the defendants or slightly modified, and the jury were fully and fairly instructed by the series. As to instruction No. 13, offered by plaintiff and given, we have examined it and do not think that it is erroneous for the reasons stated by counsel or that the jury could have been misled by it. And we are unable to say that the damages awarded are excessive.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

BARNES, P.J., and MATCHETT, J., concur.

406 - 28667

CHICAGO & ALTON RAILROAD COMPANY, a corporation,
Appellee,

vs.

CHICAGO DOCKING & TRANSFER COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

220 I.A. 638

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On August 9, 1916, the plaintiff railroad company commenced in the Municipal Court of Chicago an action of the first class, in contract, against the defendant insurance company to recover damages under a contract of guaranty insurance, commonly known as a schedule bond. The cause was tried before the court without a jury resulting in a finding of the issues against the defendant and assessing plaintiff's damages at $1861.71. On March 24, 1919, judgment on the finding was entered against defendant and this appeal followed.

The contract was dated January 1, 1916, for a term of one year, ending at 12 o'clock noon on January 1, 1917. It was subsequently extended to cover the period of another year, ending January 1, 1918. Under its provisions defendant agreed to "reimburse" plaintiff, within three months after receipt of satisfactory proofs of any claim thereunder, "for all pecuniary loss of moneys, securities, or other personal property" in the possession of any of plaintiff's employees named in the schedules attached, or for the possession of which any one of them was responsible, which plaintiff should sustain "by reason of the personal dishonesty or culpable negligence" of any of such employees, committed or occurring in the performance of the duties of their respective positions

during the period they should be respectively covered, and for which such employees so in default should be responsible to indemnify plaintiff, and which loss should be discovered and notified by plaintiff to defendant during the term of the contract or within 10 months thereafter; and it was provided that defendant should be liable on account of such respective employees only to the amount stated in said schedules opposite the name of such employee.

The action involves shortages by H. D. Bridges, assistant cashier of plaintiff at Chicago, by A. J. Ehrmann, cashier of plaintiff at Marshall, Mo., and by W. C. Rhode, special passenger agent of plaintiff at Kansas City, Mo., all of whom were covered in the schedules in amounts greater than the respective shortages - Rhode being covered only from July 14, 1917.

It appears from the evidence that Bridges wrongfully converted to his own use the net sum of $1,096.78 belonging to plaintiff; that the loss was discovered by plaintiff on or about November 4, 1917; that defendant was immediately notified, and on April 10, 1918, was furnished with proofs of loss.

It further appears that Ehrmann wrongfully converted to his own use the sum of $1000 belonging to plaintiff; that the loss was discovered by plaintiff on or about February 6, 1918; and that defendant was immediately notified, and on March 21, 1918 was furnished with proofs of loss.

It further appears that Rhode wrongfully converted to his own use the sum of $115.60, belonging to plaintiff; that the loss was discovered by plaintiff on or about October 6, 1917; and that defendant was immediately notified, and on November 9, 1917, was furnished with proofs of loss.

It further appears that after the discovery of the

mortgages of Bridges and Hansen, plaintiff collected from them respectively certain amounts and on the trial credit was given to defendant therefor; that plaintiff collected nothing from Hunds; and that the total amount of the three mortgages, with interest on each from the date proofs of loss were made on each, after applying the credits above mentioned, was $3001.71, the amount of the court's finding.

Various points are made and argued by counsel for defendant in their printed briefs here filed as grounds for a reversal of the judgment. Two of them are based seemingly upon the erroneous contention that the law regarding surveies is applicable to the contract or bond sued upon, and we think they are without merit. In U. S. Fidelity Co. v. First National Bank, 233 Ill. 375, 481, it is said:

> "The bond in question must, we think, be regarded as an insurance contract, and as such subject to the rules of construction applicable to insurance policies generally, and not the rules applied to ordinary surveties for accommodation. * * Contracts of guaranty insurance are made for the purpose of furnishing indemnity to the assured, and they should be liberally construed to accomplish the purpose for which they were made."

See, also, Bangle v. Potts, 364 Ill. 605, 607.

Counsel for defendant contend that the court erred in denying defendant's motions for a continuance. It appears that on February 10, 1919, defendant moved the court to grant a continuance on the ground of the absence of witnesses, Bridges, Hansen and Hunds. The motion was supported by the affidavit of one Jacobs. The court then denied the motion. The case, however, was not actually reached for trial until March 31, 1919, when the motion was renewed, based on the same affidavit, and without any showing of any diligence in the interim. We have examined the affidavit and are of the opinion that the court did not err in refusing to continue the case, for the reasons that the affidavit stated conclusions, rather than facts, as to the diligence used, (Bangle v. Donaldson, 290 Ill.

19, 23), and did not disclose that the testimony of said absent witnesses, sought to be obtained, was material to the issues. (Hollyville Land Co. v. Strong, 327 Ill. 516, 521.)

Counsel for defendant further contend that the proofs of loss were insufficient, because not made by one personally acquainted with the facts. There was a provision in the contract or bond sued upon that the statement of any claim thereunder, based upon the books and papers of the plaintiff and the accounts of the employer and certified as to the correctness thereof by the duly authorized officer of the plaintiff, should be prima facie evidence of the amount of such claim as against the defendant. A. A. Benson testified that he was comptroller of plaintiff and as such had general supervision of the accounting department and of the department making audits of the accounts of the employees of plaintiff. And the respective proofs submitted regarding the three shortages bore the statement: "Audited and approved for collection. A. A. Benson, Comptroller." And attached to each of the three claims of loss was an itemized statement showing in detail the particulars of each shortage. We think the proofs of loss were sufficient. Furthermore, no objections were made to the proofs prior to the trial. In Phenix Ins. Co. v. Belt Ry. Co., 182 Ill. 33, 37, it is said:

> "Have proofs of loss are served on an insurance company and retained without objection, and the company refuses to pay the loss, denying all liability under the policy on grounds other than defects in the proofs of loss, any further performance of the condition in regard to proofs is waived."

Finding no reversible error in the record the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Matchett, J., concur.

416-35677

In re AMERICAN CITIES HOTEL CORPORATION, Appellee,	)	APPEAL FROM
v.	)	SUPERIOR COURT
LEON E. STANHOPE, Intervening Petitioner, Appellant.	)	OF COOK COUNTY.

220 I.A. 639

MR. JUSTICE GRIDLEY delivered the opinion of the court.

This is an appeal from an order of the Superior Court of Cook County, entered June 23, 1919, dismissing for want of equity the intervening petition of Leon E.Stanhope.

On June 4, 1918, the American Cities Hotel Corporation, an Illinois corporation, filed its bill in chancery, sworn to by its president, Adolphus S. Coyle, praying that a receiver be appointed of all of its assets, for the purpose of preserving all of its property until there should be removed certain restraints upon its business operations, caused by the passage, April 5, 1918, of an Act of Congress, providing for credits for industries and enterprises in the United States necessary or contributory to the prosecution of the war and for supervising the issuance of securities. It was alleged in the bill in substance that said corporation had purchased and was the owner in fee of certain valuable premises in Chicago upon which it had decided to erect a hotel; that after plans and specifications for the same had been made, bids solicited, and negotiations for a loan had, the Act of Congress referred to was passed; that thereafter the corporation, by its president, applied to the "Capital Issues Committee" for permission to issue bonds of the par value of $600,000, and certain stocks and notes, for the purpose of the erection of said hotel, but that said committee ruled that the sale of said bonds and stock at that time was not compatible with the national interest, and

that because of such ruling the corporation had been temporarily prevented from carrying on its corporate purposes, and that it was for the best interest of its stockholders that a receiver be appointed. The court appointed a receiver.

On August 15, 1918, after notice to the corporation and said receiver, leave was given to file, and there was filed, said intervening petition of said Stanhope, in which it was alleged in substance that he was an architect, engaged in such business or profession in Chicago; that on or about March 23, 1918, said corporation, by said Coyle, its president "did make and enter into a contract" with Stanhope, whereby the latter "was to prepare preliminary studies and preliminary plans for the building to be erected upon said premises", for which services said corporation "agreed to pay two-tenths of a total commission of 5 per cent. of the entire cost of the building so to be erected, the cost of which was at that time estimated and determined to be not less than $600,000"; that pursuant to said contract he (Stanhope), "with the assistance of certain associate architects", proceeded to prepare ~~xxxxxxxxx~~ such preliminary studies and plans, and that on April 23, 1918, he "completed his said contract", and that there is now due to him from said corporation the sum of $6000, with interest, no part of which sum has been paid; and that on June 4, 1918 he caused to be filed in the office of the clerk of the Circuit Court of Cook County a statement of his claim for a mechanic's lien on said premises. The prayer of the petition was that Stanhope be decreed to have and maintain a mechanic's lien on said premises for said amount, interest and costs, etc.

The corporation and the receiver jointly filed an answer to the petition, in which they denied that the corporation had made the contract mentioned with Stanhope, or that pursuant to

any contract with him Stanhope had prepared any preliminary studies or plans, or that any sum was due him, individually, and alleged in substance that in April 1918, Stanhope, together with Schmidt, Garden and Martin, a firm of architects, had prepared certain preliminary plans for a building to be erected upon said premises, for which work the corporation had agreed to pay Stanhope and said firm of architects the sum of $250, in full for all services; and that the corporation had always been ready and willing to pay Stanhope and said firm the said sum.

The issues presented by the petition and answer were referred to a master in chancery to take proofs and report the same, together with his findings of fact and conclusions of law. Considerable evidence, both oral and documentary, was taken, and on March 26, 1919, the master filed his report, in which he found, in substance, that during the year 1917, the corporation, through its president, Coyle, had caused one Alschlager, a Chicago architect, to prepare certain plans for the erection of a hotel building on said premises, which said plans were afterwards abandoned by the corporation; that in February 1918, the petitioner, Stanhope, endeavored to induce Coyle to employ him as architect for the corporation in the construction of the proposed hotel building and that Coyle, at Stanhope's solicitation, turned over the Alschlager plans to Stanhope, Coyle then informing Stanhope that the corporation was unable to make a loan for the construction of the building according to said plans because of the excessive cost, and Stanhope then stating to Coyle that he (Stanhope) would procure a loan sufficient to erect the building and would also procure a contractor for the construction thereof; that subsequently Coyle, at Stanhope's suggestion, accompanied him to the office

any business that his theatre had previously any preliminary studies or plans, or that he was due his, individually, and signed in mentioned that in April 1918, Strauss, together with Hofmann, Hermann von Hardt, a firm of architects, had received certain preliminary plans for a building to be erected upon such premises, for which work the corporation had agreed to pay Strauss and with fees of architects the sum of $500, in full for all services, and that the corporation had never been ready and willing to pay Strauss and such fees the full sum.

The issues presented by the pleadings and answer were referred to a master in chancery to take proof and report the same, together with his findings of fact and conclusions of law. Considerable evidence, both oral and documentary, was taken, and on March 28, 1922, the master filed his report, in which he found, in substance, that during the year 1917, the corporation, through its president, Doyle, had issued and delivered, a distinct proposal, to process matrix plans for the erection of a hotel building on said premises, which said plans were afterwards abandoned by the corporation; that in February 1918, the president, Strauss, endeavored to induce Doyle to employ him as architect for the corporation in the construction of the proposed hotel building and that Doyle, at Strauss's solicitation, turned over the discharge plans to Strauss. This was extremely fortunate for the corporation, for it was unable to make a loan for the construction of the building according to said plans because of the excessive cost; and Strauss then starting to Doyle that he (Strauss) would arrange a loan sufficient to erect the building and would also procure a contractor for the construction thereof, that accordingly Doyle, at Strauss's suggestion, recommended him to the trustees

of said firm of Architects, Schmidt, Garden and Martin, where it was agreed that said firm, together with Stanhope, would make up certain sketches sufficient for submission for the purpose of securing the needed loan, and that the charge to the corporation for such services would not exceed $250; that thereafter Stanhope attempted to procure a loan through a certain Chicago bank; that said bank proposed that it would make a loan to the corporation, on condition that the consent to said loan could be obtained from said "Capital Issues Committee", and further that one Snyder could be procured as the general contractor, but that said Committee refused to sanction the loan and Stanhope failed to procure said Snyder as such general contractor; that, according to Stanhope's testimony, during his negotiations with Coyle, a verbal agreement was made between them, substantially as charged in said intervening petition relative to Stanhope making preliminary plans and the price to be received by Stanhope therefor; that, according to Coyle's testimony, no such verbal agreement was made; that Coyle informed Stanhope that the corporation would not enter into any agreement with Stanhope, as architect, unless Stanhope could procure a loan sufficient to erect the building and could also procure said Snyder to enter into a contract for its construction. The master's conclusions were that Stanhope had failed to establish the allegations of his petition by a preponderance of the evidence and recommended that the same be dismissed.

The objections to the master's report were ordered to stand as exceptions before the court. After a hearing on the exceptions the court confirmed the master's report and entered the order appealed from.

We have reviewed the abstract of the evidence taken

before the master and have considered the various points urged by counsel for Stanhope as grounds for a reversal of the order. No useful purpose will be served in discussing the evidence and the points. Suffice it to say that we are of the opinion that the court's order dismissing the petition for want of equity was right and should be affirmed. It appears that the corporation is indebted to Stanhope and said firm of architects in the sum of $250 for certain preliminary sketches made, but the members of said firm are not joined as parties complainant in the petition with Stanhope and the latter, under the pleadings and the evidence, cannot individually recover from the corporation in this proceeding said sum.

AFFIRMED.

BARNES, P.J., and MATCHETT, J., concur.

(Civil)

478 - 15689

LOUIS GEYLER COMPANY,
a corporation,
appellant,

vs.

ADELAIDE CHAPMAN BAKER and
FRANCIS A. BAKER,
appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

220 I.A. 639

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On February 10, 1918, plaintiff commenced this replevin action in the Circuit Court of Cook County to recover the possession of a certain "Hudson" automobile. In the affidavit it was alleged that plaintiff was entitled to the possession of the automobile of the value of $800, and that defendants, on February 14, 1918, wrongfully took and wrongfully detained the same. The sheriff took the automobile under the writ and delivered it to plaintiff. Subsequently a trial was had before a jury, resulting in a verdict finding the issues against plaintiff and that the right of property was in the defendant, Adelaide Chapman Baker. Judgment for possession in her favor was rendered, a writ of retorno habendo awarded, and plaintiff appealed.

Plaintiff is a corporation, engaged in business in Chicago in buying, selling, repairing, etc., "Hudson" and other automobiles. The defendants are husband and wife. The automobile in question, hereafter referred to for convenience as the "first car", was purchased by Mrs. Baker in January, 1917, with her own money, but not from plaintiff. On January 18, 1917, a policy for $5000 was issued by Lloyd's to "Mr. Baker", insuring him for one year against the theft or robbery of said first car, - Mrs. Baker paying the insurance premium of $70 with her own money. On March 16, 1917, the policy was so changed by endorsement that Mrs. Baker became the beneficiary. The policy contained the

provision: "The loss shall not become payable until sixty days after the notice, ascertained estimate and satisfactory proof of the loss have been received by this company." Said first car was stolen about September 7, 1917. About October 24, 1917, before the sixty days mentioned in the policy had expired and the loss would become payable, Mr. Baker had an interview or interviews with W. O. Hellman, an automobile salesman of plaintiff, resulting in the purchase from plaintiff by Mr. Baker for the sum of $1110, another "Hudson" car, hereafter referred to as the "second car". Mr. Baker gave plaintiff $110 in cash and his promissory note for $1000, payable to plaintiff's order, dated October 24, 1917, and due 30 days after date. This note was secured by chattel mortgage executed by Mr. Baker on said second car, and Mrs. Baker endorsed said insurance policy, "Pay loss to Louis Geyler Co.," and the same, so endorsed, was delivered by Mr. Baker to plaintiff as further security for Mr. Baker's debt of $1000, and said second car was delivered to Mr. Baker. Hellman testified that it was verbally agreed between plaintiff and Mr. Baker that, in case the first car was found before the expiration of said sixty days, and returned to Mrs. Baker, it should be turned over to plaintiff in part payment for the second car. Mr. Baker denied that any such verbal agreement was made, or any such proposition considered. And Hellman further testified that such alleged verbal agreement was "the only agreement in connection with this transaction that was not reduced to writing;" and there is no testimony in the record showing that Mrs. Baker, the owner of the first car, authorized her husband to make such a verbal agreement conditional upon the first car being found, or was ever aware of any such proposition being considered. Before the expiration of said sixty days the insurance company found said first car, which had been stolen, caused it to be placed in a garage owned by one Patterson

and notified the defendants. Certain repairs were made on the car by Patterson and subsequently the defendants recovered the possession thereof. Then Mr. Baker's note of $2000, given in part payment of said second car, fell due, it was not paid, and some negotiations between him and plaintiff were subsequently had. About the middle of February, 1910, Elmer V. Alexander, sales manager of plaintiff, had an interview with Mr. Baker at the latter's home, at which time said second car was in Mr. Baker's possession in a certain garage. Although the latter's note of $2000, secured by said chattel mortgage, was nearly three months' overdue, plaintiff had taken no steps towards foreclosing said mortgage. Mr. Baker testified in substance that at this interview Alexander proposed that if Mr. Baker would surrender to plaintiff said second car, plaintiff would cancel and return Mr. Baker's $2000 note; that Mr. Baker agreed to the proposition; and that said second car was delivered to Alexander early the following morning, and he drove it away, promising that plaintiff would immediately return by mail said note, and chattel mortgage securing it, to Mr. Baker, which however plaintiff did not do. Alexander was not a witness on the trial. To avoid a continuance the attorney for defendants admitted that if Alexander were present he would testify to certain facts as contained in an affidavit made in support of plaintiff's application for a continuance. In said affidavit it was not stated that Alexander, if present, would testify that no proposition of settlement was made by him to Mr. Baker, but it was stated that Alexander, if present, would testify that he had no authority from plaintiff to discharge Mr. Baker from further liability on said note, that his authority extended merely to the retaking of possession of said second car under said chattel mortgage, that he did take possession thereof under said mortgage but found it in a damaged condition; and that

the ordinary expense for making the necessary repairs on the car at the time was $600. Mr. Baker further testified that said second car was then in good condition except that the right hand fender was bent. On the day after Mr. Baker surrendered possession of the second car plaintiff began the present action and replevied said first car from the defendants. Plaintiff did not show that it demanded possession of said first car from the defendants before commencing the action. About four months after the present action was commenced plaintiff foreclosed said chattel mortgage on said second car and the car was sold to Charles Warren, an employee of plaintiff, for $600.

Various points are made by counsel for plaintiff, but we are of the opinion that, under the facts and circumstances disclosed, none of them are of sufficient merit to warrant a reversal of the judgment. The main contention of counsel for plaintiff is that the assignment of the insurance policy in question to plaintiff by Mrs. Baker carried with it the ownership and right to possession of said first or stolen car, if recovered and returned. To this we cannot agree. When the endorsement on the policy was made by Mrs. Baker, the sixty day period had not elapsed, and such endorsement amounted to nothing more than an assignment of a contingent claim against the insurance company which might never ripen, and in fact never did ripen, into a vested claim. (Hagerman v. Underwood, 67 Ill. 419, 422.) While it is true that the endorsement would have passed to plaintiff any money which might thereafter become due from the insurance company on account of the policy, the automobile was in fact recovered and the insurance company did not become liable on the policy. The testimony was conflicting as to the making of a verbal agreement concerning said first car, in case it should be recovered before the expiration of said

sixty day period, and the jury evidently thought that no such agreement was in fact made, authorized or ratified by Mrs. Baker, and we cannot say that the verdict is against the weight of the evidence. On the contrary we think that the verdict and judgment are in accord with substantial justice.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Barnes, P. J., and Hatchett, J., concur.

45 - 25809

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	ERROR TO
v.	)	MUNICIPAL COURT
TONY JEFFERY, Plaintiff in Error.	)	OF CHICAGO.

220 I.A. 639

MR. JUSTICE GRIDLEY delivered the opinion of the court.

On October 20, 1919, an information was filed in said Municipal Court charging that

"Tony Jeffery, heretofore, to-wit, on the 18th day of October, A.D. 1918, at the City of Chicago, aforesaid, did unlawfully, knowingly and willfully encourage Catherine Wischler, a female person under the age of 18 years, to-wit, 15 years of age, to be or become a delinquent child, and did then and there unlawfully, knowingly and willfully do acts which tended to render said Catherine Wischler to be or to become a delinquent child, in that he, the said Tony Jeffery, induced and encouraged her, the said Catherine Wischler, to remain away from the house of her parents with the consent of said parents, contrary to the form of the Statute," etc.

Jeffery entered a plea of not guilty and waived a jury trial. After a hearing the court found him guilty in manner and form as charged in said information and adjudged him "guilty of the criminal offence of knowingly and willfully aiding, abetting and contributing to the state of delinquency of a certain child more fully described in the information filed in this cause, then and there deemed to be a delinquent child as defined by the Statutes of this State", and sentenced him to the House of Correction of Chicago for the term of three months.

By this writ of error Jeffery seeks a reversal of the judgment on the ground of the insufficiency of the information, in that it fails to charge a crime under the statute.

The information is evidently based on sections 1 and 2 of the "Act to define and punish the crime of contributing to the delinquency of children", approved and in force June

25, 1918. (Furd's Stat. 1917; Chap. 38, secs. 42 hm. and 43 hm.) In section 1 it is in part provided:

"That for the purposes of this act a delinquent child is x x any female, who, while under the age of eighteen (18) years, violates any law of this State, x x or without just cause and without the consent of its parents, x x absents itself from its home or place of abode, x x."

In said section 2 it is in part provided:

"Any person who shall knowingly and willfully cause, aid or encourage x x any female under the age of eighteen (18) years to be or to become a delinquent child, as defined in Section one (1), or who shall knowingly or willfully do acts which directly tend to render any such child so delinquent, x x shall be deemed guilty of the crime of contributing to the delinquency of children, and on conviction thereof shall be punished by a fine of not more than two hundred (200) dollars, or by imprisonment in the county jail, house of correction, or workhouse, not more than one (1) year, or by both such fine and imprisonment."

One of the offenses, deemed a crime under section 2 of the statute, is that of knowingly and willfully causing, aiding or encouraging any female under the age of 18 years to be or to become a delinquent child, as defined in said section 1, viz: to absent itself from its home or place of abode""without just cause and without the consent of its parents". This is evidently the offense attempted to be charged in the information. But the offense actually charged therein is that Jeffery induced and encouraged Catherine Winchler, a female person of 15 years of age "to remain away from the house of parents with the consent of said parents." It is not charged that Jeffery induced and encouraged her to remain away from the house of her parents either without just cause or without the consent of her parents. We think that both were essential allegations in order to charge him with committing a crime under the statute, and that the information is clearly insufficient to sustain the judgment.

"It is fundamental that an indictment or information must allege all the facts necessary to constitute the crime with which a defendant is charged. An indictment or information that does not set forth such facts with sufficient certainty will not support a conviction." (People v. Steyan, 280 Ill. 300, 302; People v. Pigard, 284 Ill. 528, 530.)

The judgment of the Municipal Court is reversed.

REVERSED.

BARNES, P.J., and MATCHETT, J., concur.

125 - 25937

PEOPLE OF THE STATE OF ILLINOIS, for the use of M. DRAWERT, Appellee, v. ANTON J. CERMAK, and UNITED STATES FIDELITY AND GUARANTY CO., Appellants.	APPEAL FROM COUNTY COURT OF COOK COUNTY.

220 I.A. 639

MR. JUSTICE GRIDLEY delivered the opinion of the court.

From the printed briefs and arguments of respective counsel we are informed that this is an appeal from a judgment of $138.42 rendered by the County court of Cook County against the defendants (appellants) in an action in debt upon the official bond of Anton J. Cermak, bailiff of the Municipal Court of Chicago.

The printed abstract of the record filed in this court by appellants does not comply with rule 18 of this court and is not sufficient to present fully every error and exception relied upon. Neither the declaration nor the plea of defendants are abstracted. Nor does it appear from the printed abstract what the judgment was. Furthermore, while it appears that plaintiff on the trial introduced in evidence seven exhibits, in addition to the testimony of witnesses, none of the exhibits are in any manner abstracted. It has been repeatedly held that a failure to present in the printed abstract the issues involved in the case, or the judgment of the court, is a sufficient ground for affirmance. (Bishop v. Loewus, 63 Ill. App. 351; Schmitt v. Devine, 63 Ill. App. 289, 292; Deane v. Michigan Stove Co., 69 Ill. App. 106; Elia v. Societa M. S. di P.C., 203 Ill. App. 378). And the rule is applied where exhibits introduced in evidence are not abstracted. (Love v. Dick, 177 Ill. App. 98, 99; Rehfuss v.

Hill, 243 Ill. 140, 151). The court is not required to examine the transcript of the record to search for grounds for reversal. (Love v. Dick, supra; Thornton v. Muus, 130 Ill. App. 429, 434; Gage v. City of Chicago, 211 Ill. 109, 113). Where all the evidence bearing upon a question or matter assigned as error is not abstracted the court will presume that the record evidence, if completely abstracted, would sustain the judgment. (Kieshkowski v. Bostrom, 179 Ill. App. 73, 75.)

From the printed briefs and arguments of respective counsel and the abstract of the testimony of the witnesses, we gather that the evidence tended to show that Drawert claimed that Cermak, as bailiff of said Municipal Court, breached his official bond, in that he refused, when requested, to make a levy of a certain execution placed in his hands upon a certain leasehold estate, and returned said execution "no property found and no part satisfied", and thereby Drawert, plaintiff in the execution, was damaged in the sum of $128.42; that Drawert had recovered a judgment in said Municipal Court against one Samuel Adams and that on June 3, 1918, execution was placed in the hands of said bailiff; that, under subsequent citation proceedings had in said Municipal Court against said Adams, it appeared that he was the owner of a certain leasehold estate in certain premises on West Taylor street, Chicago, known as the Taylor Garage, where Adams was operating a public garage, and which said leasehold estate Adams had omitted from the schedule he had filed; that the Municipal Court ordered that Adams forthwith deliver to said bailiff an assignment of the remainder of said leasehold estate and deliver possession of his said interest in said premises to the bailiff, which said interest the Municipal Court found to

be a chattel interest; that in compliance with said order Adams, on July 30, 1918, made a written assignment of said leasehold interest to said bailiff; that subsequently the attorney for Drawert tendered to said bailiff said assignment and requested that the latter levy and sell said leasehold interest; but that said bailiff refused either to accept said assignment or to make said levy, and subsequently returned said execution "no property found and no part satisfied"; and that at the time said tender and request were made Drawert had a purchaser who was ready, able and willing to purchase said leasehold interest and pay $250 for the remainder of the term which was for about four months, and for which remainder the rent had been paid in advance.

In 1 Bouvier's Law Dictionary (Rawle's 3rd Rev.) p. 471, it is said that the word "Chattel" means "every species of property, movable or immovable, which is less than a freehold"; and that "Real chattels are interests which are annexed to or concern real estate; as, a lease for years of land". And as to the term "Chattel interest", it is said: "There may be a chattel interest in real property, as in case of a lease. x x A term for years, no matter of how long duration is but a chattel interest, unless declared otherwise by statute." By section 3 of Chapter 77 of the Statutes of this State the term "real estate" includes "estates for years, and leasehold estates, when the unexpired term exceeds five years." We think that the leasehold interest here in question was subject to sale under said execution. (Sec. 40 Chap. 77 Rev. Stat. Ill.; Barrett v. Trainor, 30 Ill. App. 420); that the bailiff should have made the levy and sale as requested; and that the court did not err in entering the judgment appealed from.

Because of the faulty abstract and also upon the merits the judgment of the County Court is affirmed. AFFIRMED.

BARNES, P.J. and MATCHETT, J., concur.

144 - 25398

CONTINENTAL AND COMMERCIAL NATIONAL BANK OF CHICAGO, a corporation,
Defendant in Error,

vs.

SAMUEL KRASTEN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

220 I.A. 639

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff, defendant in error, brought suit in the Municipal Court on a note executed by the defendant on the 17th day of April, 1917, for $2500 payable ninety days after date to the order of Graham & Sons, and by Graham & Sons duly endorsed and delivered. It claimed the face of the note with interest at 7% per annum from July 17, 1917.

The affidavit of merits denied that the plaintiff was ever the holder of the note in due course; alleged that the defendant at all times after the making of the note had an indebtedness due from Graham & Sons Bank amounting to more than the amount due on the note; that plaintiff did not purchase the note for a valuable consideration, but that, on the contrary, Graham & Sons Bank was indebted to plaintiff in a large sum, and plaintiff, knowing that Graham & Sons Bank was insolvent and unable to pay its indebtedness, demanded other securities, among them the note sued on; that no consideration was paid by plaintiff to Graham & Sons Bank at the time of said transfer, but that Graham & Sons Bank knew at the time it was insolvent and made the transfer for the purpose of defrauding its creditors; that the transfer amounted to a fraudulent preference, and was made within four months of the time a petition in bankruptcy was

filed against Graham & Sons; that by reason of the United States Statutes said transfer is fraudulent and of no force and effect; that the title to said note and the claim belongs to the estate in bankruptcy, etc.

Upon the trial the note was produced and put in evidence, and it was proved that plaintiff was the owner and held the note as collateral to a loan made to Graham & Sons Bank; that the note came into the possession of the plaintiff bank April 25, 1917, when at the request of Graham & Sons Bank, other collateral was withdrawn by them and these substituted therefor. That on that date the indebtedness of Graham & Sons Bank to plaintiff amounted to $750,941.16.

Defendant then asked leave to call the witness, who was Mr. Vernon, the assistant cashier of plaintiff, under section 33 of the Municipal Court act. This request was refused by the court. The witness, however, was then called and examined at length as defendant's witness; the certified copy of the petition to have Graham & Sons Bank declared bankrupt by the Federal Court was offered in evidence, but excluded. This petition was apparently filed June 30, 1917, at 4.20 p. m.

The witness was asked by defendant's attorney what was the total amount of collateral held by the plaintiff, to give a list of the other notes received from Graham & Sons Bank on April 25th, 1917, also what was the total amount of collateral held by the plaintiff bank on the loan of Graham & Sons on June 29th, 1917, what was the total indebtedness of Graham & Sons to the plaintiff bank on February 20th, 1917; whether the indebtedness of Graham & Sons to the plaintiff bank decreased in any amount between the dates of February

29th, 1917 and June 29th, 1917, and if so, to what extent; whether the witness knew what date the Graham & Sons bank closed its doors; whether at the time the note was received the witness knew that defendant was a depositor in that bank, and had a checking account there amounting to $5,000.

Objections to these questions were sustained, whereupon the attorney for defendant offered to prove by the witness that on the day the plaintiff bank received the note sued on, the witness knew that the defendant Kersten had a deposit with Graham & Sons of $5,000; that Graham & Sons closed their doors and did not do business after June 29th, 1917; that at that time and on April 25th, when the note was received and during the entire intervening period Graham & Sons were insolvent; that they did not have sufficient property to pay their indebtedness, were not able to meet their obligations, and that the plaintiff bank at the very time it received the note sued on knew that Graham & Sons were hopelessly insolvent, and that Kersten then had on deposit with Graham & Sons $5,000. Pages from the discount ledger showing the indebtedness of Graham & Sons to the plaintiff bank were offered in evidence by defendant, and a further question as to whether plaintiff bank called its loan to Graham & Sons was objected to and the objection sustained, and at the conclusion of the evidence the court instructed the jury to find a verdict for the plaintiff for the full amount of the note and interest, and judgment was entered on the verdict thus returned.

It is the contention of appellant that upon any suit brought by Graham & Sons, or their trustee, upon the note here sued on Kersten would have the right as against Graham & Sons to set off his account with the bank against the indebtedness

due on the note. Niblack v. Feldman, 204 Ill. App. 443; Third Swedish M. E. Church et al. v. Hatherell, 43 Ill. App. 414; Mohage v. Goodman, 38 Ill. 85. That by transfer of the note while insolvent the deposit became due, without demand, which was therefore unnecessary to create a right of setoff. Scott v. Armstrong, 146 U. S. 499; First National Bank v. Lewis, 139 Pac. 1102.

And since the evidence offered would have proved the plaintiff bank took the note with knowledge of all these facts it is not a holder in due course.

Leaving out of consideration all the merely technical objections as to the form of the questions asked, and the offers to prove, on defendant's part, the simple question to be decided is whether these facts, if proved, would have made a question for the jury as to whether plaintiff was a holder of the note in due course. Under facts substantially similar this court held in C. & O. Bank & Nat. Bank of Chicago v. Brady et al., 215 Ill. App. 644, that these facts would not avail as against a bona fide holder of a note in due course. Section 52, of the Negotiable Instruments Act defines the holder in due course as one who has taken the instrument under the following conditions. First, that the instrument is complete and regular on its face. Second, that he became a holder of it before it was overdue, without notice that it had been previously dishonored, if such was the fact. Third, that he took it in good faith and for value. Fourth, that at the time it was negotiated to him, he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. Hurd's Revised Statutes 1917, Chap. 98, 2003. By section 59 of the same Act it is provided that:

> "Every holder is deemed prima facie to be a holder in due course. But when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims, acquired the title as a holder in due course * * * ."

We think if all the evidence offered had been received it was not sufficient to overcome the prima facie showing that plaintiff was a holder in due course.

If it be conceded that at the time plaintiff's bank took the note it knew that the payee was insolvent, and that defendant, Karsten, had a possible setoff, this would not have amounted to notice of an "infirmity in the instrument" or "defect in the title of the person negotiating it." Nor in our opinion was the excluded evidence sufficient to establish the fact that the plaintiff was not a holder for value.

The evidence was that the note sued on passed into the hands of the plaintiff bank in exchange for other security held as collateral to an indebtedness of $750,941.16. There was no offer of proof to the contrary. The delivery of this other collateral was, of itself, a sufficient consideration. 8 Corpus Juris 492. C. & S. Nat. Bank of Chicago v. Brady et al., supra.

Appellant further contends that the excluded evidence would have shown that plaintiff received the note sued on within four months of the bankruptcy of Graham & Sons, and that it therefore, did not take the note in good faith by reason of the provisions of the Bankruptcy Act. That, however, is a question which can be raised only by the trustee in bankruptcy, as provided by the language of the Act itself.

It is the further contention of appellant that the court erred in refusing to permit the counsel for defendant to cross-examine Mr. Vernon, the assistant cashier of the bank,

under section 35 of the Municipal Court Act. Mr. Vernon stated in response to questions by the court "I am an officer of the corporation, duly elected, the same as directors or any other officers." We think the court should not have sustained the objection in view of that answer. However, as defendant called Mr. Vernon as his own witness, without making further protest, and as the record fails to show any particular questions which it was desired to ask the witness under said section 35, we think defendant must be held to have waived this point.

We have considered this appeal as if all proof offered in behalf of defendant was admitted, and think, thus considered, the judgment must be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

(49101

220 - 15405

IN RE ESTATE OF KATHERINE HOESEN, deceased.
JOHN H. HOESEN, JOHN H. HOESEN, executor of the estate of KATHERINE HOESEN, deceased, MARY J. WELTER, JOSEPH J. HOESEN and ANNA LIEBSTUHL,

Appellants,

vs.

KATHERINE ERKENSWECK,

Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

220 I.A. 6401

MR. JUSTICE MACGEATY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court entered on an appeal from the Probate Court of Cook County, which set aside the order admitting to probate the supposed will of one Katherine Hoesen, deceased. The Circuit Court found that this supposed will had, in fact, been cancelled by the testatrix. The proof showed its due execution, and the only question in the case is whether the will had, in fact, been cancelled.

A photographic copy of the will in the record shows the following words written across the face of it: "I hereby cancel and annul the within instrument this 30th day of May A. D. 1916." Underneath these words appear the name "Katherine Hoesen" and the word "seal" within a scroll.

Ernest Saunders, an attorney, testified that he became acquainted with Katherine Hoesen about the first of May, 1916; that he saw this will in his office on May 30, 1916; that it was at that time produced by the testatrix and delivered to him for the purpose of cancellation; that at that time the writing above described did not appear thereon, and the words quoted, other than the signature, is in the witness's handwriting; that the words "Katherine Hoesen" are in the handwriting of said Katherine Hoesen; that a

few days prior to the 26th day of May aforesaid, said Katherine Hansen came to his office and requested information as to how the will might be cancelled; that he directed her to bring it to his office; that when she brought it he told her it could be cancelled by tearing it up or destroying the signature or by the writing of cancellation across its face; that she directed him to cancel it, and that he wrote the words quoted above across the face of the instrument, and that she thereupon signed it, and he then placed the instrument in his files, where it remained until after her death, when under citation, he filed it in the Probate Court of Cook County.

Fred and Katherine Erkenbrack were present at the time, said Katherine Erkenbrack being the wife of Fred and the daughter of testatrix, and Fred himself a client for many years of the witness.

The question here raised involves the construction of section 17 of the statute on "Wills", Hurd's Revised Statutes 1917, Chap. 148, p. 2969. It provides:

> "No will, testament or codicil shall be revoked otherwise than by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence by his direction and consent, or by some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix in the presence of two or more witnesses, and by them attested in his or her presence, and no word spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law."

This statute has been construed by our Supreme Court in Dowling v. Gilliland, 286 Ill. 530, in a manner which we think makes it necessary to reverse this case. The court there said:

> "The great weight of authority is to the effect that the mere writing upon a will, which does not in any wise physically obliterate or cancel the same, is insufficient to work a destruction of a will by cancellation, even though the writing may express an intention to revoke and cancel."

In this case the writing across the will does not obliterate or destroy any word in it, and while appellee contends that the argument for this rule carries "one back to the dark ages", it appears that our Supreme Court refused to follow the rule for which appellee contends, as expressed in Larmer v. Larmer Estate, 37 Vermont, 356. We think the rule as stated by the highest court of our own state is in harmony with the intention of the legislature as expressed in the words of the Statute.

For the reasons indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

(4620)

260 - 25518

WAKEM & McLAUGHLIN COMPANY,
a corporation,
Appellee,

vs.

THE ATCHISON, TOPEKA &
SANTA FE RAILWAY COMPANY,
a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

220 I.A. 640

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

The facts in this case and law applicable thereto are similar to the case of Valentine & Company, a corporation, vs. Atchison, Topeka & Santa Fe Railway Company, case No. 25517, in which an opinion has been filed today.

For the reasons there set forth the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

296 - 25554

JULIUS AUERBACH,
Appellee,

vs.

C. E. HEATH, J. S. FOLLETT,
G. HEATH, A. D. WHATMAN,
A. BURNS and M. EVANS,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 640

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This case was tried by the court, without a jury, upon stipulation as to the facts and questions of law involved. The court found the issues for the plaintiff and assessed plaintiff's damages at the sum of $425, and entered judgment on the finding.

The undisputed facts as stipulated were that the plaintiff was the owner of an automobile and the defendant an insurance company. It issued a policy, insuring the automobile of the plaintiff against "theft, robbery or pilferage." Plaintiff lost the automobile out of his possession under the following circumstances.

> " * * * on Friday evening February 16th, 1917, at about 10.30 p.m. while plaintiff, a physician and surgeon in the City of Chicago, and his wife were at the theatre, a telephone call came from an unknown party to plaintiff's home, to the effect that Dr. Tucker, a friend and acquaintance of plaintiff, wished to see plaintiff on an important matter. When the unknown party was informed by plaintiff's maid that plaintiff would be home after the theatre, he said he would phone again, which he did after plaintiff arrived home.
>
> In plaintiff's conversation with the unknown party, who gave his name as DeWood, he was told that Dr. Tucker wished to see him, (plaintiff) immediately. Plaintiff proceeded to Dr. Tucker's office, where he found two men (who were unknown to him) awaiting him. Plaintiff was informed by these men that Dr. Tucker was not in; but had phoned them that he, Dr. Tucker, with a party of friends, while autoing, had a breakdown near Burnham, and had requested them to get in touch with plaintiff, with the hope of having plaintiff go with them to Burnham and tow Dr. Tucker back to Chicago.

Plaintiff advised the strangers that he was extremely busy, and that it was impossible for him to go. Plaintiff thereupon telephoned two places where he thought Dr. Tucker might be found, to verify what the strangers had told him. One of the persons to whom plaintiff phoned, informed plaintiff that Dr. Tucker was autoing with a party of friends. The two strangers then asked plaintiff to allow them to take plaintiff's car to tow Dr. Tucker and his friends back to Chicago. Plaintiff consented but with the understanding that the automobile be returned to plaintiff's garage by 6 a.m. February 17th, the following day. The automobile was not returned to plaintiff at that time. On February 17th, the following day, about 4 p.m. the automobile not yet having been returned, plaintiff upon inquiry, was informed by Dr. Tucker, that although the latter had been autoing the previous day he had not met with any mishap and that he had not requested nor authorized any one to solicit the use of plaintiff's car. Thereupon plaintiff informed the police of the matter, but the automobile was never returned to or recovered by the plaintiff herein or by anyone in his behalf."

It is not questioned that the automobile was worth $425, being the amount for which it was insured, and was owned by the plaintiff. The case turns on the question whether the facts as stipulated show the loss of the automobile by "theft" within the meaning of the terms of the policy.

It is elementary that the policy must be liberally construed in favor of the insured. Cottingham v. The National Mutual Church Ins. Co., 290 Ill. 26. Appellant cites Delafield v. London & Lanc. Fire Ins. Co., 164 N. Y. Supp. 222, as authority for his construction of the clause in question, but an examination of that case shows that the decision turned upon another point; that it therefore does not sustain appellant's contention. The definitions of "theft" as stated in the standard dictionaries and encyclopaedias indicate that it is generally understood to mean not only the equivalent of larceny, a word of Norman-French derivation, and the term usually employed in English legal usage to denote the crime of that name, but that its meaning is somewhat wider and that it may properly be used to include other forms of wrongful deprivation of

another's property. The common law definition of larceny has been enlarged by statute in this state. See Criminal Code, section 167, and we think, under the decisions in this state the taking of plaintiff's automobile as shown by the facts stipulated amounted to larceny. Welsh v. The People, 17 Ill. 339; Stinson v. The People, 43 Ill. 397; Doss v. The People, 158 Ill. 660; Schmid v. Heath, 173 Ill. App. 649.

Both on reason and authority the judgment must be affirmed. Federal Ins. Co. v. Hiter, 176 S. W. 210; Neal Clark and Neal Co. v. Liverpool, London & Globe Ins. Co., 165 N. Y. S. 204.

The judgment will be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

314 - 25572

EMILIE TUMA,
Appellant,

vs.

NORTH AMERICAN UNION,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

220 I.A. 610

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The appellant sued appellee, The North American Union, in an action of assumpsit upon a life insurance policy. The defendant entered its appearance and filed pleas. On the 27th day of April, 1917, in pursuance of a notice duly served on the parties, the following order was entered:

> "On motion of Robert S. Iles, receiver of the North American Union, it is ordered that leave be, and the same is hereby given him to substitute as defendant, in lieu of the North American Union. Thereupon on motion of Messrs. Eddy, Wetten & Pegler, it is ordered that leave be and the same is hereby given them to enter their appearance as attorneys for the receiver herein."

It appears that the title of the case on the docket in the court was then amended so as to read "Emilie Tuma v. Robert S. Iles, Receiver of the North American Union." And on the same 27th day of April, 1917, the following document was filed:

> "We hereby enter the appearance of Robert S. Iles, receiver of the North American Union, a corporation, the defendant in the above entitled cause, and our appearance as his attorneys.
> (Signed) Eddy, Wetton & Pegler."

December 4, 1918, upon an ex parte hearing, a judgment was entered in said case against the North American Union, a corporation, and on January 24th, 1919, thereafter, an execution issued on the judgment. February 8th, the North American Union made a motion in writing to vacate, set aside and expunge from the record the "pretended" verdict, and judgment theretofore

received and entered.

The grounds as set forth in the motion were, first, the verdict and judgment are void, second, the court had no jurisdiction at the time of the North American Union, third, the North American Union had ceased to be a party to the suit by the order of April 27, 1917. Upon the hearing of said motion the court entered an order finding that it was without jurisdiction to enter the said judgment against the North American Union, vacated it, set it aside, and expunged it from the records of the court; further ordered that the execution which had been issued should be quashed, and the North American Union should be reinstated as defendant; that it should readopt the plea theretofore filed by it, and that the cause might be set for trial at any time after the 28th inst. The North American Union, by its attorneys, now consenting thereto."

From this order plaintiff appeals, and appellee here argues that the order is not appealable, because not final, and that the appeal should be dismissed. That as a general rule an order setting aside a judgment is interlocutory and, therefore, an appeal therefrom or writ of error thereon, premature, as established by several well considered cases. Walker v. Oliver, 83 Ill. 199; City of Park Ridge v. Murphy, 280 Ill. 368; Gregory v. A. C. M. Assn., 248 Ill. 516. In the case last cited the court said:

> "It is true that if a court sets aside or vacates a judgment otherwise than under the motion substituted for the writ (of error, coram nobis), the order is interlocutory, and the parties must await a final judgment from which an appeal or writ of error will lie."

Section 89 of the Practice Act, Hurd's Revised Statutes, 1917,

page 2248, provides that the writ of error coram nobis is abolished, and that errors of fact which could have been corrected by said writ at common law, may be corrected upon written motion "made at any time within five years after the rendition of final judgment in the case, upon reasonable notice."

An examination of the motion in this case and the proceedings thereon, as appears of record, shows clearly that the motion was not in the nature of a writ of error coram nobis at common law, since the errors alleged were not claimed to be errors of fact.

But appellant argues that the motion must, nevertheless, be so considered, because it appears from the record that the order setting aside the judgment was made after the term at which it was entered, which the court would have no jurisdiction to do, and that this court must therefore presume that the trial court acted under a motion in the nature of a writ of error coram nobis. There is language in Cramer v. I. I. H. Assn., supra, and Barnes v. C. C. Ry. Co., 185 Ill. App. 149, which would seem to sustain this contention, but we think the doctrine laid down in these cases has no application where the court, at the time it entered the judgment, did not have jurisdiction of the person against whom the judgment was rendered. To so hold would be, in effect, to overrule Bolkey v. Oliver, supra, which it is clear the court did not intend to do, in the case cited.

We think in the instant case, the substitution of the receiver in lieu of the corporation was equivalent to a dismissal as to the corporation, and therefore at the time the judgment against the corporation was entered, the court did not have jurisdiction, and the judgment entered against it was therefore void and might be set aside after the expiration of the term at which it was entered. Parker v. Macoy, 91 Ill. App. 314;

Peterson v. Metropolitan National Bank, 68 Ill. App. 101.

We conclude the judgment appealed from was interlocutory, not final, and the appeal will, therefore, be dismissed.

APPEAL DISMISSED.

Barnes, P. J., and Gridley, J., concur.

349 - 25609

BENJAMIN GRUNSFELD, doing business as BENJAMIN GRUNSFELD & COMPANY,

Appellant,

vs.

CHARLES F. MURPHY COMPANY, a corporation,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

220 I.A. 640

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff appellant sued the appellee alleging in his statement of claim that he sold and delivered to the defendant at its special instance and request on October 8, 9, 15 and 16, 1917, goods and merchandise amounting to the sum of $637 plus freight charges in the sum of $2.64, making a total sum of $639.64 alleged to be due to him. Defendant filed an affidavit of merits in which it set up that it had a good defense to the whole of plaintiff's demand; that on the 2nd day of July, 1917, it had entered into a written contract with the defendant for the purchase of 50,000 ½ bushel sewed burlap potato bags on terms mentioned in the contract; that it had requested deliveries of said bags, but that plaintiff had failed and refused to deliver more than 6,000 of them; that the price of the bags had increased from the purchase price of $139.50 per thousand to $225 per thousand; that defendant had been compelled to purchase elsewhere 44,000 bags of like size and quality at said increased price; that defendant sought to recover the damage suffered by it to the extent of plaintiff's claim and reserved the right to institute separate action to recover the balance of said damages suffered by plaintiff's breach of his contract to

deliver the goods.

The case was tried by the court, without a jury, which found the issues against the plaintiff and entered judgment for costs, and from that judgment this appeal is taken.

It is the contention of appellant that the court erred in finding the issues for the defendant. The written contract which was introduced in evidence was as follows:

"Benjamin Greenberg & Company,
843-5-7 Vernon Park Place,
Cor. Blue Island Avenue,
Chicago.

July 2nd, 1917.

Chas. F. Murphy & Co.,
192 N. Clark St.,
Chicago, Illinois.

Gentlemen:

All agreements are contingent upon strikes, fire, or cause beyond our control. Quotations made F.O.B. Chicago or otherwise specified. Subject to prior sale and market fluctuations.

We herewith confirm sale to you of 50000, 2½ bu. sewed burlap potato bags. Terms and conditions as follows: Quantity:

Fifty thousand 2½ bu. sewed burlap potato bags to be properly sewed and guaranteed to hold 150 pounds of potatoes, 40" cut 54" 7½ ounce, like sample submitted.

Price 139.50 per M.

One hundred thirty nine dollars and fifty cents per thousand, f. o. b. Chicago.

Terms

Net 10 days from date of each invoice.

Deliveries.

Shipments during a period beginning with October 1st, to November 15th, 1917, in local shipments to your various stations in quantities as they may require them.

July 2nd, 1917. BENJ. GREENBERG & CO.
(Signed) Benj. Greenberg

Accepted
(Signed) Chas. F. Murphy Co.
Per Olsen"

On September 29th and October 4th thereafter defendant by letter requested that plaintiff ship at once a total of 35,000 of these bags to its various stations, and requested that it send invoices for the same. On October 8th plaintiff shipped 2000 bags, on October 9th, 1000, on October 15th, 1000, and on October 18th, 2000 bags, and rendered invoices showing these shipments as requested. The defendant did not pay for the first shipment on or before October 18th according to the terms of the contract, nor did he pay for the subsequent shipments as the same came due, claiming that some of the bags had been reported to him as not up to contract, and insisting that he would not pay until the whole of the deliveries called for by the contract had been made. He offered, however, to put the purchase price up in a bank in escrow to be paid when the entire contract was completed. The plaintiff refused to make further shipments of the bags until these payments were made and this suit was the result.

The defendant appellee argues here that plaintiff first breached the contract because he failed to deliver the full 35,000 bags ordered on September 29th within ten days thereafter, which defendant claims would have been a reasonable time, but this is contrary to the terms of the contract which provides that the shipments may be made during a period beginning with October 1st to November 15th, 1917.

It is undisputed that the defendant refused to pay for the bags according to the terms of the contract and the law is well settled that in such a case the vendor may rescind the contract and sue in assumpsit for the value of the merchandise sold and delivered. Hess Co. v. Dawson et al.,

149 Ill. 139; Chicago Crushed Coal Co. v. Whitsett, 278 Ill. 625. These decisions are, we think, in harmony with the provisions of the Uniform Sales Act, Hurd's Revised Statutes, 1917, Chap. 121a, Secs. 11, 44 and 45.

For these reasons the judgment will be reversed with finding of facts and judgment entered here for the plaintiff for the full amount of his claim.

REVERSED WITH FINDING OF FACTS
AND JUDGMENT HERE.

Barnes, P. J., and Gridley, J., concur.

349 - 25609

FINDING OF FACTS.

We find as facts that on the 8th, 9th, 15th and 18th days of October, 1917, appellant, Benj. Greenberg, doing business as Benj. Greenberg & Co., sold and delivered to the defendant and appellee, Chas. F. Murphy Co., a corporation, goods and merchandise f.o.b. Chicago, of the agreed value of $637.00, and paid freight charges on the same amounting to the sum of $2.64; that said sales were in part of a total sale of a larger amount to be delivered in installments as ordered; that defendant failed and refused to pay for said goods so delivered when the same became due and payable within ten days from the date of invoices for same; that plaintiff refused to make further deliveries under said contract and that there is now due and owing to the plaintiff, on account of said goods and merchandise delivered, its fair, cash market value at the time and place the same were delivered, plus freight charges in the sum of $2.64, making a total sum of $639.64 due from defendant, Chas. F. Murphy Co., a corporation, to plaintiff, Benj. Greenberg, doing business as Benj. Greenberg & Co., aforesaid.

1497a

1497a

364 - 25624

ADEL KANTOR,
Appellee,

vs.

BENJAMIN I. MORRIS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

1st Case No. 1497 - Ordered to be reported

220 I.A. 641

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff below sued defendant (appellant here) alleging in his statement of claim that defendant was liable by reason of his endorsement of a note for $1050, dated May 26, 1914, payable on or before one year from date with interest at the rate of 6% per annum before maturity, 7% per annum thereafter. Said note was made by Robert Fleishman and Elsie Fleishman, and by them duly endorsed and delivered. Said note was also endorsed in writing on the back thereof by one Louis Antek, and also by the defendant.

The statement of claim further alleged that on the 9th day of June, 1915, said Morris and Antek procured an extension of the time of payment of the note until the 26th day of November, 1915; that the defendant was paid a commission for securing such extension; that a judgment had been procured on the note against Antek for the sum due, but no part of the same had been paid, and that the makers were insolvent. A copy of the note was attached to the statement of claim.

By an amended affidavit of merits the defendant set up that he was an endorser upon the note sued on, and that neither at the time of its maturity or before said time, viz., May 26, 1915, was said note presented to him for payment; that no notice of its dishonor or non-payment was ever served upon him or given to him; that by its terms the said note became due May 26, 1915.

That after the maturity of the note, to-wit, on the 9th day of June, 1915, Robert Fleishman, one of the makers of the note and Louis Antek, an endorser on it, procured an extension of the time of payment of said note, until the 26th day of November, 1915, to which defendant did not agree or give his consent and at the time and before the maturity of said note, as extended, viz., on November 26, 1915, the said note, as extended, was not presented to him for payment, and that he did not receive and was not given any notice of its non-payment and dishonor. Therefore he claimed he was not liable.

The cause was tried by the court without a jury.

Plaintiff proved that she purchased the note through one Julius Greenbaum, attorney, and that said Greenbaum also represented her when the note fell due, and that he was authorized by her to make the extension. Greenbaum testified for plaintiff that he had a talk with defendant prior to the maturity of the note in May, 1915, when defendant requested an extension; that he afterwards informed them that this could be done if proper arrangements were made; that there was some difficulty about arranging the commission to be paid, and that on the 9th day of June, Mr. Antek and defendant came to the office of the witness and arranged for the extension; that at the same time a note was given for the costs of the extension, including the commission; that this note was afterwards collected by the witness, and a part of the commission was paid to the plaintiff, and the remainder thereof divided between the witness and the defendant, Morris. This distribution took place November 8, 1915, and at that time the witness mailed to the defendant a check for $129.84, which included a part of the commission and certain monies which defendant had advanced to the Fleishmans, who were defendant's clients.

The witness further testified that before the note, as extended, became due, defendant requested another extension of it,

which witness told him his client would not be willing to give, and that after the extended note became due, he also told the defendant it had not been paid; that thereafter defendant requested him to sue Antek, and that he, Morris, would then be in a position to see that the judgment obtained against Antek was collected; that witness thereupon brought suit against Antek, and obtained judgment, but it had never been paid.

Robert Fleishman, one of the makers, testified that he was present at a conversation between defendant and Greenbaum, in which defendant said:

> "He said he did not want anything out of that commission, and he wants to be off that note entirely, that is all I heard them say then. * * "

That Greenbaum said:

> "Alright, I will take this fellows' endorsement, and it is alright."

Defendant testified the first notice he received that the note was not paid was between the 3rd and 4th of June; that he then went to Greenbaum's office at the request of Fleishman, when Greenbaum said:

> "'Ben, this note is not paid, and Fleishman and I have agreed to an extension,' and I answered him that as far as I was concerned, I was off the new extension, and I do not consent to it, that if he wanted to extend this note, he would do so without my liability being connected with it, and I was off endorsing notes for clients, that I had no notice of non-payment, and that I consider my liability ended; if he wanted to go ahead and renew this note, he could do so."

Defendant also testified that a note was then given by Fleishman for money which defendant had advanced in the transaction for taxes, etc., and that defendant afterwards, at its maturity, received a check from Greenbaum for the proceeds of this note, but defendant denied that there was any commission included therein, or that he claimed, or received, a share of the commission. The witness was, however, wholly unable to explain the items of the

account of proceeds of the note as stated in the letter of Greenbaum transmitting the check therefor to him.

At the conclusion of the testimony the court denied a motion of defendant to find in his favor, found the issues for the plaintiff and entered judgment on the finding.

It is conceded that if defendant was liable on the note it was only as an endorser, and defendant claims that so there is no proof of presentment for payment or notice of non-payment and dishonor, as required by law, at the time the note fell due, May 26th, 1915, he is not liable as such endorser. It is not claimed by plaintiff that such presentment was, in fact, made, or notice given, but on the contrary, the issue tried out before the court, was whether presentment and notice had been, in fact, waived by the defendant. Section 108 of the Negotiable Instruments Act, provides, in substance, that notice of dishonor may be waived, either before the time of giving notice has arrived or after the omission to give due notice, and that the waiver may be either express or implied.

Section 119, Article 8, subsection 5, of the Negotiable Instrument Act, provides:

> "A person secondarily liable on the instrument is discharged * * by an agreement in favor of the principal debtor, binding upon the holder, to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent, prior or subsequent, of the party secondarily liable, or unless the right of recourse against such party is expressly reserved, or unless the principal debtor be an accommodating party."

And in Simonoff v. Granite City National Bank, 279 Ill. 348, the court, speaking of waiver, said:

> "As it may be implied from any acts or conduct calculated to lead the holder of the bill to believe that presentment is waived, or to mislead him and prevent him from treating the bill as he otherwise would, will operate as a waiver."

There is evidence from which the court could find that plaintiff assented to the extension, and if so, he was not, according to a respectable authority, entitled to presentment or notice when the note fell due by extension. *Amos Keag Bank* v. *Moore et al.*, 37 N. H. 539. The controlling issue in this case is, therefore, one of fact as to whether the defendant requested or assented to the extension of the time for payment of the note. He testifies he did not and is in part corroborated by his client Fleishman.

On the other hand, the witness Greenbaum testifies positively that the request for an extension was made, and there are circumstances in the case not denied by defendant tending strongly to corroborate Greenbaum's testimony. The trial court was in a much better position to weigh the evidence than is this court, and we do not think that we can hold that the finding of the court is clearly and manifestly against the weight of the evidence.

The judgment will, therefore, be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

42 - 25304

(49 Ia)

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

WALTER KNOWLES,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

220 I.A. 641[2]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was charged with a violation of Sec. 270, Chap. 38 of the Revised Statutes of Illinois, Hurd's Revised Statutes, 1917, page 1611.

He waived a jury. The court heard the evidence, found the defendant guilty, and sentenced him to six months in the House of Correction.

The testimony for the prosecution tended to show a long criminal record, that at the time plaintiff in error was arrested he was in the company of a known thief, that he did not work or have any known legal means of support,

Plaintiff in error testified in his own behalf in denial of the charge. He is not corroborated by any of his supposed employers, one of whom the record shows was present in court but failed to testify.

The record does not leave us in doubt of the guilt of plaintiff in error and the judgment will, therefore, be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

26313

ALBERT B. YUDELSON, Complainant, vs. DELSON KNITTING MILLS et al., Defendants. ALEXANDER C. DELSON, Appellee, vs. ALBERT B. YUDELSON and HELEN M. FREUND, Appellants.	INTERLOCUTORY. APPEAL FROM CIRCUIT COURT, COOK COUNTY.

220 I.A. 641 3

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order for an injunction issued by the court upon crossbill filed by the defendant against complainant and others, and the recommendation of a master in chancery endorsed thereon that the injunction issue.

It restrained the complainant Albert B. Yudelson and Helen M. Freund, who was made a co-defendant to the crossbill, from selling, assigning or in any manner disposing of any shares of the Delson Knitting Mills issued and outstanding in their names, and likewise from disposing of any notes executed by cross-complainant prior to February 1, 1916, and made payable to them or either of them, and particularly from prosecuting certain suits begun by them in the Municipal Court on such notes. It is necessary to an understanding of the case that the proceedings should be stated at length.

On the 10th day of May, 1919, Albert B. Yudelson filed his bill of complaint in chancery making defendants

thereto Delson Knitting Mills, a corporation under the laws of Illinois, Alexander C. Yudelson, his brother, alias Alexander C. Delson, Ike Tishler and W. H. Fisher. Therein he alleged that he was a stockholder in the corporation; that Alexander was the owner of more than half of the stock and thereby controlled it through the election of two of its three directors; that since the year 1915, he, Alexander, had elected directors who were subservient to his own wish, and that defendants Tishler and Fisher were so elected directors, and under the control of defendant, Alexander Delson, were in various fraudulent ways which the bill set up in detail, committing acts of spoliation against the corporation and thereby depriving the complainant of his rights as a stockholder.

The bill prayed "That an account may be taken * * of the transactions entered into by the said Alexander C. Yudelson, alias Alexander C. Delson; that all transactions entered into by him with said corporation, in which said corporation suffered a loss, or in which he, the said Alexander made a profit, should be set aside, and an accounting had, and the said Alexander * * may be ordered to pay to the said corporation such sum or sums of money as the court shall find to be due to said complainant * * * ."

The bill also prayed for general relief.

The defendants filed a joint and several answer admitting that the complainant became a stockholder at the time of the organization of the corporation, alleging that prior thereto the defendant, Alexander, etc., was the sole proprietor of a business engaged in the manufacture and sale at wholesale and retail of knitted goods and other merchandise; that on about February 3, 1915, the Delson Knitting Mills, a corporation,

was incorporated to take over the retail business, which it did; that all the stock therein was delivered to complainant and placed in his name without consideration, but in trust; that he, complainant, is the brother of said defendant Alexander, and a rabbi and physician, wholly inexperienced with the business; that he afterwards refused to recognize defendant's rights; that a consolidation of the wholesale and retail business was afterwards effected and the capital stock of the corporation increased to $50,000; that complainant refused to consent thereto until he was given one-third of the capital stock of the corporation to be issued in the name of complainant, which was, therefore, issued to him without consideration. The defendant further denied that the directors were subservient and denied, in detail, the various acts of spoliation against the corporation as alleged in the bill.

Thereafter the defendant, Alexander C., filed a cross-bill, and afterwards the amended and supplemental crossbill, upon which the injunction was granted. In this he set up proceedings theretofore had in the cause, and further alleged that in truth and fact the complainant had no lawful or equitable right or interest in the corporation; that he had obtained all his stock in the corporation under the following circumstances; that in the year 1911, cross-complainant was sole owner of the business, which was conducted under the name of A. J. Nelson; that a firm known as Louer Bros. were buying the entire product manufactured by him; that in May of that year cross-complainant decided to open a retail store and for that purpose leased a building in Chicago when he learned that Louer Bros. carried on their books as their own assets the said business of cross-complainant; that he became alarmed and told complainant, who was his brother and a rabbi and who advised that all of the business should be

conveyed to him, and that in order to show some consideration for the transfer cross-complainant should execute notes in the sum of $8680; that these notes should be pre-dated and marked "paid"; that afterwards complainant and cross-complainant went to a lawyer, who through a misunderstanding, or otherwise, presented a judgment note for $8680 payable to the order of complainant and which cross-complainant signed with the bill of sale intending thereby only to convey the property, but that he continued in possession and conducted the business as formerly; that he continued to do business with Louer Brothers until 1915, when said Louer Brothers became financially embarrassed; that cross-complainant then learned that Louer Brothers claimed that he, cross-complainant, owed them $15,000, which he did not, and that they claimed an interest in the business; that he, cross-complainant, again went to the complainant, who advised that the retail business be incorporated with a capital of $10,000 and all the stock issued to complainant in trust; that such corporation was thereupon organized with 200 shares of the par value of $50 each of which cross-complainant subscribed for 190 shares, complainant one share, and F. Dawn Eby one share; that cross-complainant transferred the retail business to the corporation in payment for his stock and on the same day transferred all his stock to complainant; that this was a mere matter of form; that Eby assigned his share to Helen Freund, and this also was held in trust for cross-complainant. That the claim of Louer Bros. was afterwards released when he, cross-complainant, requested complainant and Freund to re-transfer the stock, which they refused to do, claiming an interest in the property by reason of certain loans or advances; that the complainant Albert B. had made certain loans and advancements, and discounted certain notes after July 23, 1912, the aggregate amount of which cross-complainant does not know; that the dis-

counted notes and all others have been paid; that in the latter part of 1915 or early in 1916, cross-complainant requested from complainant his statement of all amounts due and offered to pay whatever was, in fact due, which statement was refused to him; that he thereupon became alarmed because of the apparent absolute ownership of the stock by complainant, and to regain control for himself requested defendant to permit a consolidation of the wholesale and retail business, but they refused to do this, unless and until one-third of all the capital stock of said corporation should be issued and delivered to said Yudelson and Freund. That cross-complainant consented, but under protest; that he delivered the wholesale business and property worth $32,000 to the corporation and increased its capital stock to $58,000; that three hundred and one shares thereof were issued to Albert B., one share to Helen Freund, and accepted by them in full satisfaction of all their demands and claims; that these claims were, in fact, fictitious.

By way of supplement it is alleged that since the filing of the original crossbill Helen M. Freund began suit in the Municipal Court of Chicago upon the note for $8699, dated July 22, 1918; that the case is now pending, and that until this suit no demand had been made for payment; that prior thereto he did not know the note was executed or outstanding; that she is neither a holder for value, nor did she take it from any such holder.

It is also alleged by way of supplement that since the filing of the crossbill Albert B. has begun suit against cross-complainant in the Municipal Court on note for $1,000, dated June 11, 1914, that this suit also is pending; that he is informed and believes that said Albert B. and Helen have other

notes in their possession, executed and delivered by him, prior to the time when they "demanded and received and accepted one-third of all the stock of the Delson Knitting Mills, a corporation, in full satisfaction and settlement of all their claims and demands against your orator." That they have threatened to and will institute other actions at law upon these notes unless they are restrained, etc.

Cross-complainant also prays for discovery of such notes.

Helen M. Freund, in open court on the hearing, disclaimed all interest in share of stock held by her, and offered to deposit it, duly assigned in blank with the clerk of the court.

The prayer of the supplemental crossbill was for answer, a discovery of the notes, an accounting with reference to all the transactions set up, and that cross-complainant might be decreed to be the rightful owner of all the shares of the capital stock of the Delson Knitting Mills issued and outstanding in the names of the defendants, and the defendants might be required to deliver them up properly assigned and that an injunction against the prosecution of the suits at law or any transfer of the stock issue.

Of the points raised and argued by appellant it will, in our view of the case, be necessary to discuss only one, which is, that the amended and supplemental crossbill is not germane to the original bill. The literal meaning of the word "germane" is "near akin", and as originally used, designated those who were near akin by blood or marriage. Dolese v. Pierce, 134 Ill. 140. When used, as here, it can therefore only be in a metaphorical sense. It is often difficult to draw the line between crossbills which are germane to the original bill and those which are not, but in general it may be said that matters which are foreign to the subject matter of the original suit and disconnected from it

and which make new issues and parties different from those in the original suit are not germane to it, and may not, therefore, be set up by crossbill.

Sometimes in the interest of justice and in complicated cases the court may, in its discretion, allow the filing of a crossbill in the nature of an original bill in which the issues made are not exactly germane to those of the original bill. R. C. L., Vol. 10, pages 263-4. But the facts in this case do not call for the application of any such discretion. The original bill, as filed, presented the not unusual case of a minority stockholder alleging that the holder of the majority of the stock had used it to his personal advantage to the detriment of the corporation in which all the stockholders are interested; in other words, acting as a spoliator of the corporation.

The standing of complainant as a stockholder, the defendant Alexander Nelson's control of the corporation, as alleged, and his alleged improper use of that control to his personal advantage and to the disadvantage of others, as denied by the answer, made up the issues. In so far as the supplemental crossbill seeks to have the suit at law on the notes in question enjoined, it admits the execution of them, but sets up no fact from which it may be inferred that the execution or delivery of these had anything to do with the ownership of the stock in the corporation, the control of the corporation, or its spoliation.

Further, its allegations negative grounds for equitable intervention, in that it sets up that these notes have all been paid in full, thus showing an adequate and complete remedy at law. We think the supplemental crossbill, in so far as its allegations with reference to these suits at law are concerned, is not germane to the original bill, and that the injunction should, therefore, not have issued, and the order for it will therefore be reversed.

REVERSED.

Barnes, P. J., and Gridley, J., concur.

(1500 a)

167 - 12421

EDWARD WOOD,

Appellee,

v.

EMERY MOTOR LIVERY COMPANY,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 641[4]

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On July 17, 1919, the plaintiff, Edward Wood, brought suit in the Municipal Court of Chicago, against the defendant, Emery Motor Livery Company, for damages for being injured by an automobile driven by an agent of the defendant. The cause was tried before the court without a jury and the plaintiff recovered a judgment in the sum of $600.00. This appeal is therefrom.

The statement of claim alleges, inter alia, that a certain automobile owned by the defendant, while being driven north at the intersection of Cottage Grove avenue and the south Midway drive in Chicago, by one of its agents, was negligently and carelessly operated so that it collided with an automobile - in which the plaintiff was a passenger - which was being driven in an easterly direction at the intersection and seriously injured the plaintiff.

The defendant in an affidavit of merits alleged that it was not guilty of any negligence such as was set forth in the plaintiff's statement of claim, but charged that

the injury complained of resulted solely through the negligence of the plaintiff and because the automobile in which the plaintiff was riding was being driven in a careless and negligent manner in violation of the rules of the road and the ordinances, while the defendant's automobile was being driven with due care; also, that at the time of the collision the parties were all operating and working under the provisions of the Workmen's Compensation Act and were bound thereby. In an additional affidavit of merits the defendant charged that the plaintiff and one Busch were driving and riding in said automobile without authority of the owner or person rightfully in possession of said car and were "railroading" said car contrary to the statutes.

On July 24, 1917, at about 2:30 in the morning one Busch drove an eight cylinder King car, with the plaintiff sitting at his right in the front seat as a passenger, east on the north side of the Midway towards Cottage Grove avenue. Busch testified that he was driving at about 18 miles an hour. One McCall, a chauffeur for the defendant company, was at the same time driving a car north on Cottage Grove avenue towards the Midway. The two cars collided at the intersection of the Midway and Cottage Grove avenue and as a result the plaintiff Wood was injured. The injuries of the plaintiff consisted of a fracture of the humerus of the right arm and a cut on the right side of the forehead. The car which Busch drove belonged to one Dr. Flanigan, who had left it with the Harry Newman Stratton Co. for the purpose of having it, as he says, toned up. Busch was an employee of the Newman Stratton Co. He testified that he had the privilege of taking the car out; that the superintendent

had told him he could use it but that he was not exactly using it for his own pleasure but to make adjustments; that he was trying it out on the morning in question; that he charged for the time he was out, from seven until half past two, and made his ticket for it. Busch, who was the foreman over the plaintiff, called at the house of the plaintiff and routed him out of bed very early in the morning, shortly after midnight, to take a ride. The plaintiff got in and they drove around for about 45 minutes before the collision. Busch testified that he was just about to cross the street car tracks on Cottage Grove avenue when he saw the defendant's car coming north on Cottage Grove avenue about 200 feet away; that the latter's machine was traveling about 45 miles an hour; that it was a Stearn's taxicab and being driven by McCall; that before he, Busch, could do anything the defendant's car struck his machine and threw him to the left; that he, Busch, was going at about 15 miles an hour as he was crossing Cottage Grove avenue; that his machine was thrown facing west; that the defendant's car went 65 feet north of the point of collision before stopping. There is a slight ambiguity in the testimony of Busch as to the speed at which the defendant's car was going when he first saw it 200 feet away and when it was, as he says, "right on top of me." He testified that when he first saw it 200 feet away he, Busch, was on the west rail of the south bound car track in Cottage Grove avenue and that the collision occurred at the east rail of the northbound car track. He further testified that he naturally thought the other car would stop and accordingly acted on the theory that the other car would stop; that it was supposed to stop at the boulevard.

Wood testified that he first saw the defendant's car 200 feet south of the intersection and that it was going from

45 to 50 miles an hour and that Busch was driving the car in which they were crossing Cottage Grove avenue at that time at from 14 to 16 miles an hour, and that before they could avoid it their car was struck. On cross examination, he stated that the collision occurred at the east rail of the northbound track so that they had gone about 12 or 15 feet from the time they saw the defendant's car until the collision; that he did not say anything to Busch, did not interfere with him in any way; that he could not tell how fast it was going until it hit them; that Busch applied the brakes and tried to get out of the way; that he turned north on Cottage Grove avenue to avoid a collision but didn't get more than a foot or two before the collision took place; that he seemed to slacken down and the other car seemed as though its speed was increased from what it was when 200 feet away.

One Coleman, who was in the automobile supply business and happened to be walking down to the park at the time in question, testified that he saw the defendant's car going about 35 miles an hour; that it did not slow down when it reached the south drive of the Midway; that he saw the car that was going east along the Midway; that he wondered if they were going to miss; that he heard the crash and ran towards the place of the collision; that the car in which the plaintiff rode was turned completely around on the front wheels and the rear end was partially up over the grass plot with one of the rear wheels broken off, and the defendant's car was about 100 feet over the curbstone on the lawn of the Midway up against a post.

The evidence of McCall, the chauffeur of the defendant, is directly contradictory to that of Busch, Wood and Coleman. McCall testified that he was going north on Cottage

Grove avenue, and when he reached the Midway came to a full stop and then proceeded to cross the street; that he looked east first and then west; that when he looked west he saw a machine coming; that it was quite a distance from him; that he calculated he had room to cross ahead of the car that was coming; that at the time his car was in second speed; that he tried to go ahead to give the car coming from the west enough room to pass around him and in so doing it turned with him to a certain extent and hit his car about midway or a little to the rear and knocked it into a lamp post over the curb; that the other car ended up on the north side of the south drive, the front wheels in Cottage Grove avenue and the right rear wheel over the curb and broken; that the other car gave no signal and made no attempt to stop; that at the time he was on night duty and was going back to the garage at 34th and Michigan; that he crossed the midway at about 10 miles an hour; that he couldn't get 40 miles an hour out of the car he was driving; that after the collision his machine was about 40 feet north of the intersection of the midway; that it stopped because the gears became locked.

As to the position of the cars, one Furlong, who went out to the place in question for the defendant shortly after the accident, testified that he found the defendant's car five or six feet east of the sidewalk and about ten feet north of the drive facing northeast, the gears locked in speed so that when the car was in motion you could not stop it; that it was 60 feet in from the Midway but only ten feet north of the drive.

The defendant offered in evidence a written statement signed by Busch and also one signed by Wood. The one signed by Busch was admitted in evidence but the one signed by Wood was

rejected.

Various propositions of law and fact were presented to the trial judge, some of which were held and some refused. The court found the defendant guilty and assessed the plaintiff's damages in tort at the sum of $600.00 and entered judgment thereon. This appeal is therefrom.

It is contended by counsel for the defendant that as the plaintiff, riding with Busch, saw the defendant's car coming at the rate of 45 to 50 miles an hour when the car in which he was riding was just about to cross the southbound car tracks, it was his duty to do something to avert the collision; that as he said nothing to Busch and saw the other machine increase its speed he was guilty of negligence. We do not agree with that contention. It is only reasonable to assume from the situation and speed of the cars as shown by the evidence, that both Busch and Wood did what was required of them. Busch acted, in part at least, on the theory that the defendant's car would stop at the south side of the Midway and to a certain extent he was right in acting upon that conclusion. And as to the plaintiff, we are unable to say that it was his duty affirmatively to caution or inform or direct Busch just at that critical moment as to what to do. Such a collision, considering all the circumstances from the time Busch and Wood first saw the defendant's car coming from the south up to the time of the actual contact occurs in a few seconds and necessarily gives a passenger but little time in which to act upon the mind of the driver. It is common knowledge that interference by a passenger at such a time may do more harm than good; the situation is entirely different from that of a passenger riding in a horse drawn vehicle.

By the foregoing it is not meant that the plaintiff need not prove that he was in the exercise of ordinary care for his safety but that, considering the circumstances as they were shown by the evidence, the jury was justified in concluding that the plaintiff was at the time in the exercise of ordinary care. Opp v. Fryer, 294 Ill. 535.

Counsel for the defendant argues that a word from the plaintiff to Busch "to increase the speed or stop or turn at the time he saw this on coming car so negligently driven would have averted the accident." With that we do not agree. It was the duty of the driver of the defendant's car to stop at the south side of the Midway. He says he did stop but that is denied by both Busch and the plaintiff, and evidently was not believed by the trial judge who saw the witnesses.

It is further contended by counsel for the defendant that there is no liability because the plaintiff knew that the car in which he was riding was being used unlawfully and reference is made to Sec. 15, Chap. 121 of the Statutes. That statute, however, merely provides that "no chauffeur or other persons shall drive or operate any motor vehicle or motor bicycle on any street or highway in this state in the absence of the owner of such motor vehicle or motor bicycle without said owner's consent;" etc. It has no application to the facts in this case.

It is further contended that if Busch and the plaintiff were using the car in question as employees of the Newman Stratton Co. and that Busch had taken the plaintiff in to give him a ride and take him to work, then the defendant and the Newman Stratton Co. both being under the compensation act, the only remedy of the plaintiff would be against his employer. On that subject the evidence clearly shows that the plaintiff

at the time of the collision was not working for the Newman Stratton Co. but was out riding for pleasure.

It is further contended by counsel for the defendant that as to a certain written statement to which was appended the signature of the plaintiff, and concerning which counsel for the defendant on cross examination propounded certain questions in an endeavor to lay the foundation for impeachment, the trial judge erred in ruling that before such questions could be asked the witness would have the right to see the document; and, further, that the court also erred in refusing to admit the document in evidence. There is no doubt but that counsel for the defendant was entitled to cross examine the plaintiff in an endeavor ultimately to prove that his testimony on direct examination was inconsistent with statements he had formerly made and which appeared in the writing above his signature, and, also, that counsel was entitled to have the proffered writing received in evidence. (Gen. No. 25348, Lach v. Pearson, App. Ct. 1st District). But, as there was no material or substantial discrepancy between the contents of the proffered written statement of the plaintiff (nor of that of Coleman) and his testimony, we are of the opinion that the error was insufficient to justify a reversal of the judgment. Moreover, the abstract of record does not contain in any way the subject matter of this contention, and in the brief and argument for the defendant our attention is merely directed to the passages of the record where the proceedings are set forth. That is not a compliance with the rules of this court.

Finding no error in the record the judgment is affirmed.

O'CONNOR AND THOMSON, J.J. CONCUR. AFFIRMED.

236 - 25493

PATRICK M. JOYCE, et al,
Appellees,

v.

THOMAS J. HEALY, et al,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 641[5]

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On April 1, 1917, the plaintiffs leased to the defendants a building at the corner of 35th street and Archer avenue, Chicago, for a period of one year at an annual rental of $1800.00, payable in monthly installments.

It was provided in that lease that at its termination by lapse of time or otherwise the lessees would yield up immediate possession, otherwise pay as liquidated damages for the time possession was withheld the sum of $10.00 per day. The term of that lease having expired, the plaintiffs brought suit in forcible entry and detainer and for liquidated damages. The plaintiffs' statement of claim alleges that in accordance with the terms of the lease the plaintiffs were entitled to $660.00, owing to the failure of the defendants for a period of 66 days, from May 1st to July 5th, 1918, to yield up possession. On August 26, 1918, in a judgment which recited that it was "the agreement between the parties hereto made in open court", the court found the defendants guilty of unlawfully withholding from the plaintiffs the possession of the premises and that the right to

the possession was in the plaintiffs, and on that finding entered judgment that the plaintiffs recover possession and that a writ of restitution issue therefor; that the plaintiffs recover their costs and that the cause as to the claim for damages be postponed to August 29, 1918. Subsequently, pursuant to an order of the court the plaintiff filed an amended statement of claim increasing the ad damnum to $1000.00.

The first affidavit of merits filed by the defendants was stricken from the files. They then filed an amended affidavit of merits. In the first affidavit of merits the defendants claimed that it was agreed that upon the expiration of the lease they should remain in possession at the same rental and should hold over under said lease until such time as a new building, which was then being erected for the defendants on another lot, was finished. The second affidavit of merits set up that about April 1, 1918, the plaintiffs and the defendants made an oral contract that when the written lease expired, that is on April 13, 1918, they should continue in possession as tenants, until a certain building was finished, under like terms and conditions as expressed in the written lease except as to the amount of monthly rental which it was agreed was "to be a reasonable amount to be thereafter agreed upon between said parties." It further set up that the reasonable rental was $150.00 per month and that on April 29, 1918, they offered to pay $150.00 for the month of May, 1918, but that the plaintiffs refused it, claiming that they were entitled to say what should be a reasonable rental, and that a reasonable rental was $300.00 per month; that the plaintiffs and defendants have never been able to agree as to the amount of such rental; that they have vacated the leased premises and stand ready to pay reasonable rent from the time of

the expiration of the written lease and their surrender of possession.

At the trial, which took place on March 25, 1919, the plaintiffs offered in evidence the written lease of March 27, 1917, and a transcript of the proceedings of August 26, 1918, which set forth that the court by agreement of the parties found the defendants guilty of unlawfully withholding the premises, and rested.

The defendants offered in evidence the testimony of themselves and certain correspondence which took place between the parties. The defendant Healy testified that in January, 1918, he had a telephone talk with the plaintiff, Patrick M. Joyce, in which he told the latter that the construction of the defendants' new building was being delayed; that in view of that, they, the defendants, would probably want to remain in the premises for a few months after the expiration of the lease; that Joyce said, "That will be all right." "We can arrange that"; subsequently in March of the same year in another conversation with Joyce he, Healy, said, "You remember the talk I had with you about the situation."; that Joyce said, "Yes, that will be all right, you can remain over a few months and it will be all right."; that he then asked Joyce "What about the rental" and that Joyce said, "Well, we will take that up and we can get together on that"; that he, the witness, said, "Very well, we will go on with the understanding that we will remain over and get together on the rental."; that he had another conversation with him in April in which he asked him what the rental was going to be and that Joyce said, "Well I will see about that"; He further testified that the defendants vacated the premises on August 1, 1918, and that a fair and reasonable value of

the maintenance of the military force and their preservation of government.

At the trial, which took place on March 21, 1921, the plaintiff affirmed in replying the written issue of March 17, 1917, and a knowledge of the proceedings of August 20, 1918, which was that that not only by agreement of the position found the determinant policy of voluntarily withholding the payment, and period.

The defendants alleged in evidence the terminary of immediate and certain correspondence which took place between the parties. The defendant Smith in January, 1922, he had a telephone talk with the plaintiff, Patrick H. Dogue. In which he said the latter that the conditions of the defendants' not building was still telegraed; that in view of that, they, the defendants, still preferred to remain in the problem for a few months after the expiration of the lease; that Dogue said, "That will be all right." "We can arrange that"; subsequently in March of the same year it another conversation with Dogue, Smith, said, "Pat transfer the back I had right you check the expiration."; that Dogue said, "Yes, that will be all right, you can remain over a few months and it will be all right."; then in then asked Dogue "What about the rental" and that Dogue said, "Well, we will talk that up and we can get together on that"; then he, the witness, said, "They said, we will go to work and arrangement that we will remain over and get together on the rental."; that he had another conversation with him in April in which he talked the about the rental and going to be and that Dogue said, "Well, I will let right that", he further testified that the defendants received the letter of March 17, 1917, and that [illegible]

the property for May, June and July, 1918, was $150.00 per month. On April 3, 1918, the defendant, Healy wrote to Joyce as follows: "Referring to our several conversations wherein you agree to permit us to remain a few months in our present quarters beyond May 1, 1918, I beg to advise you as requested that the lease does not make provision for such rental as you intimate." On April 8, 1918, F. M. Joyce wrote the defendants that he had been informed that their new building would not be completed for a few months, and, in the course of that letter, used this language, "wish to state as May 1st is the renting season and as I will probably have to hold the place open until fall this is to notify you that the rent will be $301.00 per month or part of month - or if it is your intention to vacate by April 30th kindly let me know by next mail." In answer to that letter the defendant Healy wrote stating that the rental demanded in the Joyce letter of April 8th "is far in excess of our present rent and in view of the previous assurance to the writer that the rental would be adjusted satisfactorily between us it is surprising to say the least to now learn your present attitude. However, we will be pleased to confer with you at your convenience about the amount to be paid." On April 22, 1918, Joyce wrote to the defendant Healy in answer to the latter's letter of the 18th inst., in which he, Joyce, states that he never agreed to let the defendants stay in the building after the lease expired. That letter contains the following: "The lease calls for a payment of $10.00 per day for every day you stay in the building after the lease has run out. I was just wondering if you ever put yourself in the other fellow's place in any of your financial propositions. I suppose you realize

that one cannot very well rent space in between renting seasons, also that I have carried out to the letter all contracts and agreements I have ever had with you and at all times have been willing to do the fair thing. I am sorry you have been delayed on your building, but it is not my fault and I cannot see why I should make any sacrifices and there is no necessity of conferring any further with me in regard to this matter. Please advise if you are willing to pay the amount I ask, which in my opinion is fair."

On April 26, 1918, the defendant, Healy, sent a check for $150.00 enclosed in a letter in which he wrote stating that it was "a reasonable sum for the month of May, 1918." On April 27, 1918, Joyce sent back the check for $150.00 and a letter in which he stated that he was the one to say what he considered a reasonable rent and that the rent was $301.00; that he figures it at $10.00 per day; that the defendant, Healy, is notified to accept that letter as a notice to vacate.

The defendant Litsinger testified that the reasonable rental value of the premises between May 1 and August 1, 1918, was $150.00 per month. In rebuttal, Joyce testified that he had several conversations with the defendant, Healy, and that in the second conversation he asked Healy if there was not a clause in the lease that provided for the time that the defendants might occupy the premises beyond the expiration of the lease; that Healy said he did not think there was; that he had a third conversation with Healy in which he told the latter that the lease provided for what the rental would be if the

defendants remained in the premises. On cross examination Joyce testified that, in the same conversation with the defendant Healy, when the latter spoke about remaining in the premises after May 1st, owing to the fact that their new building would not be finished, he, the witness, answered, "you will have to stay if your building is not finished." When undertaking to explain that expression Joyce said that it was understood that the matter was to be talked over further; that there was a telephone conversation and that he was anxious to cut it short; that he was trying to get out of the telephone conversation and get back to his family. On cross examination in rebuttal he, further, denied that he and the defendant, Healy, ever agreed upon the defendants remaining over in the premises. He states that they never agreed on anything.

At the close of the evidence, the case having been tried without a jury, the court found the issues against the defendants and entered judgment in favor of the plaintiffs and against the defendants in the sum of $1000.00 and costs. From that judgment this appeal was taken.

It is contended by counsel for the defendants that the conversations which took place in January and March, 1918, between Healy and Joyce resulted in a new contract for the extension of the lease until the completion of the defendants' building which they were having erected upon another lot. A careful examination of the testimony of Healy and Joyce and all the correspondence that passed between them seems to show conclusively that the minds of the parties never met upon the terms of a binding oral contract. From the evidence in the record there is no doubt but that Healy and Joyce talked the

matter over but the evidence is insufficient to show that Joyce agreed to a new contract. Joyce wrote to the defendants on April 3, 1918, notifying them that the rent would be $301.00 per month after April 30, 1918, and it is quite obvious that that letter and the subsequent correspondence tended very strongly to show that the parties had never agreed upon any extension. Healy in his letter of April 10, which was written in answer to Joyce's letter of April 3, refers to "previous conversations". The only claims, as far as those conversations were concerned, are that Joyce agreed to permit them, the defendants, to remain over after May 1, and that the rental "would be adjusted satisfactorily" between them.

Joyce testified that he had three conversations with Healy; that at the first conversation in January, when Healy called him on the telephone, Healy told him it would be impossible to get their building finished by May 1st and wanted to know if there would be any objection to their staying in the present building, he intimated to Healy he would not put them out. Joyce's testimony on that subject may be slightly ambiguous, but apparently he intended Healy to understand him as saying that as it would be difficult for them, the defendants, to get out they might have to stay in. Joyce says, at the second conversation, he asked if there was not a clause in the lease that provided for the time the defendant might stay in after the expiration of the written lease; that Healy said at that time he did not think there was. And, as to the third conversation, Joyce says he asked Healy if the lease did not make a provision for what the rent would be if they stayed over, but that Healy hung up the receiver and did not finish the conversation. We are of the opinion that the evidence fails to show that the

conversations and negotiations between Joyce and Healy which occurred in the year 1918, prior to May 1, of that year, resulted in the creation of a binding oral agreement.

It is further contended by the defendants that it was error for the trial court to enter judgment on July 26, 1919 on the issue in forcible detainer in favor of the plaintiffs for possession of the premises, and then, months afterwards, enter final judgment in favor of the plaintiffs for damages and costs. The Municipal Court Act Sec. 48 Sub. Sec. 3, provides that: "in forcible detainer cases the plaintiff may unite with his claim for possession of the property any claim for rent or damages for withholding possession thereof. * * *" Obviously, under that section, even if the trial on both the issues, that for possession and that for damages, took place at the same time, it would still be necessary for the court to render two judgments; and the fact that the judgments in the instance case were actually entered at different times, the first by agreement, cannot reasonably be claimed to constitute error, when in the first place it is according to the law and in the second place it in no way prejudices or harms the defendants.

It is further contended that damages were allowed for time which expired after the beginning of the forcible entry and detainer suit. That contention is untenable as we are of the opinion that it is the law that, in such a case, judgment may be entered for that which has accrued up to the time of the trial. Sterrett v. Lennards, 211 Ill. App. 256. It is further contended by counsel for the defendants that the only evidence as to the time when the defendants vacated

the premises is that of Healy, who stated that they were out of the building on the first of August, 1918, and that on that day the keys were turned over to the agents of Joyce, and that, as only 93 days expired between the first of May and the first of August, the total amount that could be claimed at $10.00 per day would be $930.00, whereas the judgment rendered was for $1,000.00. With that contention we agree. The judgment will, therefore, be modified by reducing it to the sum of $930.00 and interest from April 12, 1919, the date of the judgment in the trial court, and as so modified said judgment will be affirmed for the amount aforesaid; the costs in this court to be charged against the appellants.

JUDGMENT MODIFIED AND AFFIRMED.

O'CONNOR AND THOMSON, J.J. CONCUR.

(150 20)

248 - 25505

KATIE LEHMAN,
Complainant and Cross-Defendant,
Appellant,

v.

JULIUS LEHMAN,
Defendant and Cross-Complainant,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

STATEMENT OF THE CASE.

On February 15, 1917, the complainant, Katie Lehman, filed a bill of complaint charging her husband, the defendant, Julius Lehman, with cruelty and desertion and praying for a divorce. It alleges the necessary residence; that they were married on May 2, 1909; cohabitation until June 20, 1918; that no children were born; that the defendant mistreated her; that on March 15 and April 26, 1913, he struck her; that on August 1, 1913, he kicked her and threatened to assault her; that in June, 1914, he struck her; that, also, on May 2, 1915, March 2, 1916, February 1, 1917, and May 20, 1917, he assaulted her; that he consorted with other women; that he wilfully deserted her on June 20, 1917, and has since refused to live with her.

On January 11, 1918, the defendant filed an answer. Therein he admitted both residence and marriage but denied the charges of cruelty and set up that the complainant on June 19, 1917, struck him with an iron sauce pan, and was guilty of extreme and repeated cruelty. He also denied consorting with other women; denied desertion and set upthat his earnings were $20.00 a week.

On the same date he filed a cross bill of complaint. Therein he charged his wife with extreme and repeated cruelty; that in March 1913, she struck him in the face; that in June 1914, she struck him on the head with a wooden stick; that in August, 1914, she threatened to kill him with a revolver unless he left their home; that in March, 1918, she struck him in the face; that in April, 1917, she struck him on the head with an iron sauce pan, cutting his scalp; that on June 19, 1917, he found two, almost nude, photographs of his wife, and when he inquired about them she struck him; that in June, July and August, 1918, she committed adultery with one Suess at Saugatuck, Michigan, and also, in Chicago, in the months of September and October, 1918; and, also, in June, 1916, and June, 1917, with men unknown to him.

On December 2, 1918, the complainant filed an answer to the cross-bill. Therein she denied the general and specific charges of cruelty, and those of adultery. On February 11, 1919, the trial of the issues precipitated by the original bill, cross bill and answers took place before the chancellor. The evidence was substantially the following: The plaintiff and the defendant were married on May 2, 1909, at St. Peters Church, Chicago. The complainant at the time of the trial was 34 years of age. No children were born to the marriage. The complainant and the defendant have not lived together since June 20, 1918. The complainant testified that at the time of the trial she was five feet tall and weighed 112 pounds; that she was born in Vienna, Austria, and came to this country in 1906. The defendant was born in Russian-Poland, and came to Chicago in 1904 and is now an American citizen. The defendant is an engineer by trade, and was employed by the Lindsay

Light Company for six years.

The testimony of the complainant is that she always treated her husband kindly; that before she was married she worked as a domestic in private families; that in their married life after the first three years he struck her a great many times; that on March 15, 1913, they quarreled about getting breakfast and that when she refused to allow him to get it, or to prepare it, he choked and struck her and in return she struck him with a pot which was on the gas stove; that as a result he had a cut and she called a doctor; that that was the only time she ever struck him; that he frequently called her a street-walker and other evil names; that he kicked her many times and once in 1914, or 1915, he came home at two o'clock in the morning and stood on the bed and tried to fight with her and then took her by the feet and pulled her from the bed, as a result of which she fell on the floor and was injured; (that that occurred about March, 1916) that on one occasion when she was ill she asked him if he had someone else and he told her he had; that she promised him if he had someone else he liked better than her she would give him his freedom; that on one morning about two o'clock in February, 1917, he came home on that occasion kicked her and threw her on the hot stove, burning her arm; that he also pushed her outside the door and she spent the rest of the night at the Plaza Hotel; that the next day when she went back he kicked her again injuring her; that on February 4, 1917, he threw her on the bed and knelt on her back and choked her until she became unconscious; that sometime in the spring of 1917, he threw her down the stairway; that the defendant was in the habit of kicking her; that once he was before the court of domestic

relations and was placed on probation for a year; that he earned $20.00 a week; that for weeks at a time he did not speak to her.

The testimony of the defendant is that he never struck her or spoke harshly to her; that their troubles began about the second year of their marriage; that he did not want his wife to work but that she would go to work anyway; that she worked a year before he knew it; that she said she went to night school but he did not see her go; that twice she said she was going to night school and came home at two o'clock in the morning; that on another occasion she stayed out until three o'clock and said that from night school she went to Mrs. Sauer's house; that many times she was out until two or three o'clock, especially in winter time and sometimes did not come home at all; that she went to Saugatuck and was gone four days before he knew where she was; that about March 13, 1913 she hit him in the face with a slipper; that on February 6, 1917, she hit him on the head with a sauce pan, cutting his head so that a doctor had to be called; that it was because he had put a bone on the floor for their dog.

Two indecent, semi-nude photographs of the complainant were offered in evidence. The complainant testified that she had a camera and had the photographs taken by one Mrs. Sauer at a camping place at Fox Lake to please her husband; that when they were finished she gave them to her husband. The evidence of the husband is that he never asked his wife to have the pictures taken in the nude; that he knew nothing about them until he found them in their rooms.

The only witness called on behalf of the complainant outside of herself, was one Mary Crowley, a claim adjuster for the American Railway Express Company. She testified that she knew the complainant and defendant for two years and lived at their place from April to the latter part of May, 1917; that during that time the complainant treated her husband as a wife should treat her husband but that the defendant treated the plaintiff very unpleasantly; that they quarreled continually; that the defendant spoke German during the quarrels, a language that she, the witness, did not understand; that for two weeks the complainant slept on the floor in the front room but one night after a quarrel with her husband she left their rooms half dressed and remained away all night and told the witness that she went to the Plaza Hotel; that she saw black and blue marks on the plaintiff's elbow and arms, which the complainant told her she received when her husband threw her down; that she, the witness, heard her fall but did not see the quarrel; that she heard her on that occasion say "please do not break my wrist"; that the next day she saw black and blue bruises on her arm.

Eight witnesses were called on behalf of the defendant. One, Mrs. Aminter, a Viennese, who had been in this country seven years and had known the complainant and defendant during that time and who admitted that she was not a friend of the complainant, testified that the complainant on one occasion intimated to her over the telephone that she had spent a night in the rooms of one Mr. Schmurfiel, but there is no evidence in her testimony of any acts of cruelty on the part of the complainant.

The witness Julia Peplow, a girl 17 years old, who

knew the parties about six years and lived in the rear of the building, on the second floor, over which the complainant and the defendant lived, testified that as she lived downstairs she could not see into the flat of the complainant and the defendant; that from what she heard they quarreled very often; that "when she gets so - I don't know how to express it - she gets so hysterical, she tore her hair, tear her clothes and pick up things and fire - I don't know if off the dresser where she picked it up - she used to pick up and fire at him. I could see from the window upstairs, we could look right in the window. After while she pick up things off the dresser and fire at him."; that sometimes she heard them quarreling every day and then again once a week.

A witness Guenther, who lived in the same house on the second floor, testified that several times in March, 1916, there was a great deal of noise in the rooms of the complainant and defendant and that he went up and told her to keep quiet or he would have her put under bonds.

The witness Mrs. Butler, who lived in the same house for about eight years and in a flat underneath, testified that in the spring of 1916, the defendant called her upstairs and she saw the complainant lying on the floor with foam at her mouth and screaming; that the complainant tried to grab her; that the complainant used to scream like a crazy woman.

The witness Mrs. Stein, who knew the parties for a year and a half after they separated, testified that the complainant told her shortly after they separated that her husband always gave her money and never struck her, also, that she show-

ed her a love letter which she had received from a man in New York.

The witness Nina Peplow, who knew the parties for six years and lived in the same building and saw them almost every day, testified that she often heard the complainant and the defendant quarreling at night and that she would hear the complainant "holler" and break dishes; that the defendant would always tell her to keep quiet; that then she, the witness, and her family would shout to her to keep quiet for a while; that she never saw the defendant do anything unbecoming a husband; that he always was a gentleman; that the complainant went around scantily dressed in the presence of roomers.

The witness Loretto Peplow, 13 years old, testified that she heard them quarreling but it was always the complainant's voice that she heard.

The witness Marie Otte, who knew the parties for about seven years and lived next door to them, testified that she often heard them quarreling; that you could hear the complainant's voice all over the neighborhood; that she never heard him; that about November 14, 1917, the complainant offered her $15.00 or $20.00 if she would not testify against her; that on one occasion she told her that she had cut her husband's head open with a sauce pan; that she never saw the complainant strike her husband but they quarreled often; that she has heard her call him vile names; that the complainant, when she first knew her, was a chambermaid at the Plaza Hotel.

The witness Schroeder, the owner of the property

where the complainant and the defendant lived, testified that he had known them about eight years; that after they separated he put the complainant out because she constantly quarreled with the other tenants; that he has always known the defendant's conduct to be good.

The witness Helen Gellet, called in rebuttal by the complainant, testified that she had known the parties ever since they were married and had lived in the same house with them for about two years; that the complainant's reputation was good; that she never saw her undressed nor partly dressed about the house but that she often complained of her husband striking her.

The defendant offered in evidence a letter of one Gomez, whom the complainant met at Saugatuck, Michigan, in which he had written: "I am really sorry of what happened there and I wish now I had done differently."

Evidence was offered showing that the complainant, since they were married, spent 118 evenings in attendance at the Waller Evening School.

At the close of the evidence the chancellor said: "I don't think this woman has made out any case against her husband here. I don't believe the statements she made in reference to his treatment, and so I think she is a woman suffering from some disease, which is not uncommon among women in a nervous condition, and that she has imagined things, such things which are not true. I find the original bill is not sustained, be dismissed for want of equity, and the divorce will be granted on the Cross Bill." "I don't find any evi-

dence that she has committed adultery. * * * I think she was cruel to him. You may amend the Cross Bill." On February 17, 1919, a final decree was entered dismissing the original bill of complaint for want of equity and granting a divorce to the defendant on the ground of cruelty. The decree of divorce recited that the complainant had been guilty of extreme and repeated cruelty as charged in the cross bill; that in March, 1913, she struck defendant on the face with her hand; that in June, 1914, she struck him on the head with wooden stick; that in August, 1914, she flourished a revolver in their home and he took same away from her; that in April, 1916, she struck and scratched him on face; that in April, 1917, she struck him with sauce pan on the head cutting scalp and requiring three stitches by a physician; in June, 1917, struck him with her hands on discovery of two partly made photographs, all of which acts caused physical injury to husband; that between May, 1913, and June 20, 1917, she frequently provoked quarrels, used vile language in a loud voice, and made his life burdensome and unendurable.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

Section 1 of Chapter 40 of the Revised Statutes, entitled "Divorce" provides "that in every case in which a marriage has been or hereafter may be contracted and solemnized between two persons and it shall be adjudged * * * that either party * * * has beenguilty of extreme and repeated cruelty * ** it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage contract."

The facts in each case must be considered by themselves; and it is well known that no two marital situations are ever entirely similar. In each instance where a divorce is sought, the question is one of substantial and not technical proof. In Ward v. Ward, 103 Ill. 477, where four or five distinct physical acts of assault and battery were proven the court said:

> "It is difficult to define with precision what is and what is not extreme and repeated cruelty. The same act is not the same thing under all circumstances, and to all persons. Necessarily each case must, to a large degree, be judged by itself. It is said, with perhaps sufficient accuracy, in Poor v. Poor, 8 N.H. 307: 'In the judgment of law, any wilful misconduct of the husband which endangers the life or health of the wife, which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe, is extreme cruelty, and in order to account to such cruelty it is not necessary that there should be many acts. Whenever force and violence, preceded by deliberate insult and abuse, have been once wantonly and without provocation used, the wife can hardly be considered safe.'"

In Trenchard v. Trenchard, 245 Ill. 313, the court held that, although two acts of alleged physical violence were charged in the bill of complaint, as there was no charge that those "acts which were committed in anger without justifiable provocation nor that the defendant in error was hurt or injured on either occasion" and as it was not made to appear that as a result of those alleged acts of violence the complainant might reasonably fear she was in danger of receiving bodily harm at the hands of her husband if she continued to live with him, that the bill of complaint did not state a case of extreme and repeated cruelty within the meaning of the statute.

In Hitchins v. Hitchins, 14 Ill. 327, the court said: "In no instance is a single act of physical violence

a sufficient ground for divorce; and when the husband is complainant, it is not sufficient to show slight acts of violence upon the part of the wife toward him, so long as there is no reason to suppose that he will not be able to protect himself by a proper exercise of his marital powers."

In Severns v. Severns, 167 Ill. App. 141, the court said: "It is now a settled rule in this state that where the husband asks for a divorce from his wife upon the ground of extreme and repeated cruelty he must make out a clear case"; and "it is not sufficient for him to show slight acts of violence on her part toward him, so long as there is no reason to suppose that he can not protect himself by a proper exercise of his marital rights."

In the instant case, the testimony of the various witnesses on the subject of extreme and repeated cruelty is irreconcilable. The complainant testified to a series of acts of cruelty and so did the defendant. A careful scrutiny of all the evidence, however, fails to show sufficient corroboration of the testimony of either, on that subject. For the complainant, there was but one witness in addition to herself, and she merely testified that the complainant treated her husband properly and that they quarreled continually; that she saw certain marks on the plaintiff's elbow and arms which the complainant told her she had received when her husband threw her down, but she further stated that she did not see the quarrel but merely heard the complainant request her husband not to break her wrist. Of the eight witnesses called for the defendant; Mrs. Aminter says nothing on the subject of cruelty. Julia Peplow merely testified to the fact that the complainant would grow hysterical and tear her hair and clothes and that

the complainant sometimes picked up things and threw them at her husband, apparently admitting, however, that she never saw the complainant strike or hit her husband, although she heard them quarreling very frequently. Guenther and Mrs. Butler stated nothing concerning cruelty, although the latter testified to being called upstairs and seeing the complainant lying on the floor with foam at her mouth and screaming. Mrs. Stein stated that the complainant told her that her husband never struck her. Nina Peplow stated that she often heard them quarreling but stated nothing on the subject of cruelty. Loretto Peplow merely testified that she heard them quarreling. Mary Otto that she often heard them quarreling and although she heard the complainant calling her husband vile names she never saw her strike him. It is admitted that she struck the defendant on February 6 or March 15, 1915, but she claims it was done in self defense and that she did it after he choked and struck her and he denies <u>in toto</u> her explanation of it. Obviously the proof fails to show what in the eyes of the law is considered extreme and repeated cruelty on the part of the complainant. Evidently beginning a short time after they were married they quarreled almost continuously and each one seemed to be suspicious of the other. The complainant seems to be a woman inclined to hysteria and without self control and as a result of that disposition, on many occasions according to the evidence of the neighbors, indulged in a great deal of loud talking and caused obvious disturbance to the people living in the same premises; but that by itself according to the law is not grounds for a divorce. It was necessary for the defendant to show by sufficient evidence some physical

assault and batteries in addition to mere threats and a quarrelsome attitude on the part of his wife. Although after living with her for some years, he discovered she had an obnoxious disposition, that in no way entitled him to be relieved of his marital obligations.

Counsel for the defendant argues that the evidence shows that the complainant is a woman possessed of an ungovernable temper, selfish and inclined to vulgar associations, and that, when things did not suit her fancy, she would go into a rage and abuse her husband to such an extent that it is a miracle that he escaped with his life; that if the parties had not separated at the time they did she might have killed the defendant or maimed him for life.

That may all be true and yet not be sufficient to justify a divorce on the ground of cruelty. It might have justified certain proceedings whereby she would be restrained, but it does not follow that it constitutes under the statute a justification for divorce on the ground of extreme and repeated cruelty.

The record shows considerable evidence on the subject of adultery; the letter of Gomez, the testimony that she spent the night in Schmurfiel's rooms; the semi-nude pictures and other evidence. But, as the chancellor intimated, all taken together it was insufficient to prove that charge.

Being of the opinion, therefore, that the evidence fails to prove that the complainant, Katie Lehman, was guilty of extreme and repeated cruelty, the decree is reversed; and, as no other error is complained of, the cause will be remanded

with directions to enter a decree dismissing the cross bill of complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

O'CONNOR AND THOMSON, J.J. CONCUR.

(15030)

288 - 25546

ANNA KEATING DONAHUE,
Appellee,

v.

ANTHONY DE ANDREA,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

220 I.A. 642

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On June 16, 1919, the plaintiff brought suit against the defendants, Anthony De Andrea and Joseph Esposito, for damages for personal injuries caused from being struck by an automobile. In the course of the trial, the suit was dismissed as to Joseph Esposito. The cause was tried before a jury and a verdict and judgment in the sum of $750.00 was obtained against the defendant, Anthony De Andrea. This appeal is therefrom.

On April 17, 1916, the plaintiff, a single woman, who lived at 5708 Drexel avenue, shortly before 7:45 in the morning, started to work. She was employed as a stenographer by the E. E. Lloyd Paper Company at 208 South La Salle street. It was her habit to cross over the driveway at 57th street, Chicago, and go through Washington Park to the elevated at 55th street. At 57th street and the entrance to the park there are four streets that come together. There are crosswalks on both sides of the driveway. The driveway is over 100 feet wide. In the morning in question, before she crossed

she looked, according to her testimony, to see whether there was anything coming, and saw the automobile of the defendant about one block away, to the northwest; the drive at that point not being straight. She was alone, at the time, and had walked about a hundred feet and was walking at a reasonable rate according to her testimony; there were no other automobiles in the drive or close to where the disaster took place at the time or just prior thereto. The day was clear. The last time she saw the automobile in question, she was almost across the drive, and was within eight or ten feet of the sidewalk. Then, according to her testimony the automobile was about sixty feet north of her, was going twenty miles an hour, gave no warning, and then struck her on the right side and knocked her down, spraining her shoulder, tearing some of the ligaments, bruising her whole right side, and scraping her face. She was taken to the St. Bernard Hospital and remained there one week. It is her testimony that the defendant DeAndrea drove the car and, also, that after she was injured, drove her to the hospital. December 16, 1917, she was married. In doing her housework, according to her testimony, she gets very little help from her right hand and that the disability is owing to the injury she received. She testified that at the time of the trial she had fully recovered from the injuries to her face and side, but not from those to her shoulder.

Three witnesses testified for the defendant; De Andrea (the defendant), Esposito and Fosco. They were the occupants of the automobile. The evidence of the defendant, De Andrea, is to the effect that one Fosco was driving the automobile and when they reached the neighborhood of the collision there was an old man standing on the driveway and

that Fosco sounded the horn and the old man said "Go ahead"; that at the same time another machine was coming from the south going north; that the old man was about 10 feet away when he told him to go ahead; that he thinks the plaintiff stepped in front of the automobile on the west side of the drive; that she was going west and then from west she would go east, and Fosco zigzagged the machine trying to avoid her; that finally the bumper of the machine struck her and she fell underthe machine; that she was then picked up and put in the machine and that Fosco said to him, the plaintiff, "You better drive I am kind of excited"; that he, the plaintiff, then drove the automobile to the hospital; that he did not own a car at the time of the accident; that the automobile he was riding in belonged to Esposito; that before he noticed the man for whom Fosco blew the horn the automobile was going about 16 to 17 miles an hour; that it was then slackened up; that when he got to the plaintiff the automobile was not going more than 3 or 4 miles an hour; that it was then stopped right in front of her and the bumper knocked her down; that her foot was under the machine and her whole body outside. On cross examination he testified that he was president of the Sewer and Tunnel Miners' Union; that he did not remember the kind of automobile that went north; that it did not stop; that, when it passed by, the plaintiff stepped from behind right in front of the automobile he was riding in. The witness Fosco testified that he was driving the automobile in question; that it did not belong to him; that he requested Esposito that morning to let him have the automobile as his own was out of order; that he got the automobile from the gargage on 87th and Wentworth avenue; that he picked up the plaintiff at his house; that he, the witness, was driving the car for his own

personal affairs and was not employed by her in the service of the defendant that morning; that he was going to 70th street and Cottage Grove avenue on business for himself; that he, himself, was driving the automobile at the time of the accident which happened between 57th and 59th streets in Washington Park; that at the time of the collision he was going about 4 or 5 miles and hour and there was an old man on the east side of the street and an automobile coming from the south going north; that when he saw the old man he slackened his speed; that the old man waived at him to pass and he, Fosco, was uncertain whetherhe said go or not; that at that time the plaintiff passed from the other side and he found her right in front of the automobile he was driving; that he put the brake down and tried to prevent the wheel from hitting her; that the radiator near the bumper hit her and he stopped right there after he hit her. On cross-examination he testified that that was the first time he had ever driven that automobile; that he called up Esposito in the morning and told him that he would like to use his automobile; that he is secretary for the Sewer and Tunnel Miners' Union, and the defendant is president; that after the accident the defendant drove the car as he, Fosco, was nervous; that he first saw the plaintiff when she was in front of his car.

The witness Esposito testified that he was not present at the time of the accident; that he loaned his automobile to Fosco; that on the morning in question Fosco called him up about six o'clock and said "Joe can I use your car, I got to go some place"; that he, Esposito, answered him "Yes".

The cause was tried before a jury and they found the issues in favor of the plaintiff and against the defendant and assessed the plaintiff's damages at the sum of $750.00. Judgment was entered thereon and this appeal taken therefrom.

The document filed on behalf of the defendant and purporting to be the "Brief and Argument for appellant" is irregular in form, containing only, as it does, a desultory argument of the matters involved in the appeal. It does not contain, as required by rule 19 of the rules of practice of the Appellate Court"; A short and clear statement of the case, including first, the form of the action; second, the nature of the pleadings * * *, third, in cases depending upon the evidence the leading facts which such evidence proved or tended to prove, without discussion or argument and without detail; fourth, how the issues were decided upon the trial or hearing and what the judgment or decree was; and fifth, the error relied upon for reversal."

The questions discussed in the brief and argument for the appellant are, first, did the defendant own and operate the automobile at the time of the collision?; second, was the plaintiff in the exercise of care and the defendant guilty of negligence?

First, did the defendant own the automobile and was he operating it by himself or by his agent? The evidence of the plaintiff is that she observed who was driving the automobile at the time the accident occurred and that he was the same man who drove her subsequently to the hospital and that he was the defendant. The evidence of the defendant is that at the time of the accident he did not own an auto-

mobile and that the machine he was riding in on the day in question belonged to Esposito. The evidence of Fosco is that he was driving the automobile at the time in question and that he had borrowed the automobile from Esposito. The evidence of Esposito is that he loaned the automobile in question to Fosco. Esposito, however, in a plea which he had already filed had denied "that he owned, managed, operated, or controlled the said automobile mentioned", etc.

There is obvious contradiction between the testimony of the plaintiff and that of the defendant and his two witnesses, but, of course, that subject was a matter for the consideration of the jury, and, inasmuch as the testimony of Esposito contradicts the statement in his plea, it is quite obvious that the jury were justified in refusing to give much, if any, weight to his testimony. And, the doubt that arises by reason of the ambiguity of his testimony may have given rise, reasonably and justifiably in the minds of the jury to considerable doubt as to the honesty of the defense.

Second, as to the alleged negligence of the defendant:- The testimony of the plaintiff taken by itself constitutes sufficient proof that at the time in question she was in the exercise of reasonable care for her own safety. It is her evidence that before she crossed over she looked to see whether there was anything coming and that she only saw one machine about a block away to the northwest and that at the time she was walking at a reasonable gait. It is true, it was somewhat difficult place, inasmuch as four roads came together in thateneighborhood, and, as the plaintiff testified, she had to turn and watch each road to see whether an

automobile was coming.

The story told by the defendant and his two witnesses, taken by itself, is evidence of contributory negligence on the part of the plaintiff. Their evidence is that the automobile slowed down to three or four miles an hour in order to allow an old man who was standing near the edge of the sidewalk to cross over, as it then seemed he intended doing, and at that time an automobile came up from the south and passed between the automobile in question and the plaintiff who was crossing the driveway from the east side to the west; that as that automobile passed she came out from behind it and stepped in the path of the defendant's automobile; that as she did so she went back and forth and that, although the automobile was zigzagging to avoid her, she was struck just as the automobile came almost to a standstill. Obviously in determining liability, with the evidence as it is, the important question is what credence shall be given to the testimony of the different witnesses. The jury evidently both on the subject of ownership of the automobile and as to the circumstances of the collision, did not believe the defendant and his witnesses.

Weighing the matter, as it comes to us in the record, we do not feel justified in overriding the verdict of the jury.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'CONNOR AND THOMSON, J.J. CONCUR.

responsible for conduct.

The money held by the authorities and his own relatives, being in itself, in criminal or quasi-criminal cases the proof of his criminality. Their evidence is not the admissible should only be taken if that which is done in order to allow an old man who was allowing over the rule of the difficult to decide even, so it also should be treated doing, and at best then an authority even to free the crook may perhaps believe the authority to question and the claims that his was preventing the freeing from the main so in the world such an that responsible person who now are then the time it not whether in the case of the criminal criminality that so the did so the work that the work and with criminal the authorities has alleviating in doing but, the not crime just as the authorities have allowed in a criminality. Certainly in independent liability, with the violence or it is, the criminal authority is most economic until in place in the authority of the different authorities. The more relatively than as the history of everybody of the authorities and as in the crime change of his authorities, all of further the criminal the independent.

Judging the matter, as it does, in or in the crowd, we do not feel justified in excluding the result of the jury.

Either we write in the street the jurisprudence in [illegible].

[illegible]

[illegible]

(1942)

297 - 25556

C. A. BARNS AND MARY BEN BARNS,
Appellees,

v.

PARKER AUTOMOBILE STATION,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 642[3]

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On January 23, 1919, the plaintiffs brought suit in the Municipal Court against the defendant for damages to their automobile which were alleged, in the statement of claim to have been caused by the negligence of the defendant, on or about the tenth day of June, 1918, while the automobile was in the control of the defendant or its servants or agents. The statement of claim recites the following:

> "Defendant for a valuable consideration undertook to deliver to plaintiffs their certain automobile from the premises of the defendant to the residence of plaintiffs and while conveying the said automobile the defendant or its servants so negligently and improperly manipulated, operated and propelled the said automobile that it became and was damaged and broken, necessitating repairs thereon, and that the fair and reasonable charge for making said repairs is One Hundred Fifty-eight Dollars and Sixty Cents ($158.60); to the damage of the plaintiff in the sum of One Hundred Fifty-eight Dollars and Sixty Cents ($158.60)."

On January 13, 1919, a summons was issued and on January 15, 1919, was returned with the following endorsement made by the Deputy Sheriff; "Served this writ on the within named Parkier Automobile Station, a corporation, by

delivering a copy thereof with a praecipe and statement of claim and affidavit attached thereto to H. Salavat, Agt of said corporation and at the same time informing him of the conditions thereof" etc.

On January 23, 1919, the record shows that there was a trial of the cause before one of the judges of the Municipal Court and the following order and judgment was entered of record:-

> "Now come the Plaintiffs in this cause, the defendant being absent and not represented and thereupon this cause comes on in regular course for trial before the court without a jury, and the court having heard the evidence and the arguments of counsel and being fully advised in the premises enters the following finding, towit:-
>
> 'THE COURT FINDS THE DEFENDANT, Fashion Automobile Station, a corp., GUILTY IN MANNER AND FORM AS CHARGED IN PLAINTIFF'S STATEMENT OF CLAIM, AND ASSESS THE PLAINTIFFS DAMAGES AS THE SUM OF One Hundred Fifty-eight and 60/100 ($158.60) Dollars, INTCRT.'
>
> This cause coming on for further proceedings herein, it is considered by the court that the Plaintiff have judgment on the finding herein and that the Plaintiff have and recover of and from the defendant, FASHION AUTOMOBILE STATION, A CORP., the damages of the Plaintiff amounting to the sum of ONE HUNDRED NINTY-EIGHT and 60/100 ($158.60) DOLLARS, in form as aforesaid - assessed together with the costs by the Plaintiff herein expended and that execution issue therefor."

On February 21, 1919, a motion was made on behalf of the defendant that the finding and judgment of January 23, 1919, be vacated and set aside. That motion the court ordered entered and set for February 26, 1919, at two o'clock P.M.

On March 18, 1919, the record shows the following: "This cause coming on for hearing upon the motion of the defendant heretofore entered herein that the finding and judgment of January 23, 1919, be vacated and set aside and

the court being fully advised in the premises overruled said motion."

In the bill of exceptions it is recited that when the motion to vacate came up before the trial judge, he said that "there being some question in his mind as to the sufficiency of the affidavit he would hear testimony in support of the affidavit and motion." It was also recited that "the parties hereto expressly agreed that the court might hear evidence as though contained in the affidavit in support of said motion."

There was then read to the court the affidavit of one Harry Salvat, and the testimony of Richard Garrity, Otto Kuppenbauer and Harry Salvat was heard. Harry Salvat in his affidavit states that he is the president and owner of the defendant Fashion Automobile Station; that on the afternoon of the day that the summons was served he went home ill and was confined to his bed several days seriously ill with influenza under a physician's care; that when he returned to his office January 25, 1919, about two days after judgment was entered he found a summons on his desk and at once notified attorney and informed him that judgment had been entered; that when he left his office on the day summons was served he expected to be able to return the next day and to go to see his attorney; that on account of his illness he was unable to attend to any business and that he is the only one who has charge of the office; that no one else knew or could have known that summons had been served and have given the matter proper attention. His affidavit further recites that he has a good and meritorious defense;

that a servant of the defendant while driving an electric automobile owned by the plaintiffs to the residence of the plaintiffs and while so driving and conveying said automobile in a careful manner and while shifting gears the reverse stuck and caused the automobile to back into a curb causing damage to the automobile; that said accident was without fault or negligence of said servant; that he, Salvat, notified the plaintiff of the accident and the plaintiff said he had similar experiences and that the defendant should go ahead and repair the automobile and that he would pay for the same as he believed the accident was without fault on the part of the defendant or its servant and that he would request the insurance company to make good the loss; that afterwards the plaintiff paid the defendant the cost of repairing the automobile and defendant heard nothing more until the insurance company brought suit in the name of the plaintiff to reimburse itself.

The affidavit of Garrity, a chauffeur, who was in the employ of the defendant corporation and had been for about three years and who drove the electric automobile belonging to the plaintiffs at the time in question, is to the effect that the defendant company stored the car of the plaintiffs and delivered and called for it; that on the day in question they undertook to deliver the car to the plaintiffs home on Blackstone avenue; that it was necessary in making a certain turn of the machine to put it in reverse; that he put it in reverse; that the car started to back up; that it was then, after driving a certain distance, he attempted to stop it before it reached the curbstone of Blackstone avenue, "but the control froze or stuck so that he was unable to pull

it back into neutral and release the reverse pedal." He jerked on it as hard as he could and attempted to get it out of this condition and back to neutral but was unable to do so and because he could not get the control to move, he could not release the reverse pedal. When this happened he put on the service brake and though he was only going three or four miles an hour, the brake was not strong enough to hold the car and it backed up over the curb stone across the sidewalk and the lawn and into a fence which stopped it." that the emergency brake would not work and as a result the car continued to move and thewheels to revolve until their foreman, who had come to take him back to the garage after delivering the car, got in and by kicking the control finally managed to shut off the current.

The testimony of Huppenbauer corroborates that of Garrity that the control lever, particularly with Chicago electric cars, occasionally froze, that is, the points of contact, by reason of a short circuit, melted and became welded together and that it was then very difficult to release the control and often impossible.

Salvat, also, testified that he examined the car when it came back and that the drum and switch showed a fusing of the copper where the parts had melted together and had been broken loose by the violent kicking of the control and emergency brake; that a few days later he was requested by the plaintiffs to repair it; that he did so and was paid by them $155.00. Salvat further testified that the freezing of the lever had happened several times on that car and that Marsh had so told him.

At the close of the evidence, the bill of exceptions

shows the following, "and thereupon the court stated that in his opinion the relationship between the parties was that of bailment and that there was evidence to show where the driver could not have backed straight down the street instead of into the curb and thereupon the court refused the motion to vacate the default and judgment to which action of the court the defendant duly accepted."

After considering the affidavits and hearing the testimony, the court overruled the motion to vacate the default and judgment. This appeal is therefrom.

The argument of counsel for the defendant, that, as the defendant corporation was served on January 15, 1919, by leaving a copy of the summons with the President of the defendant corporation, and the person who was served as president went home on the afternoon of that day ill and was confined to his bed several days seriously ill with influenza under a physician's care, and when he returned to his office January 25, 1919, he found the summons and at once notified his attorney that judgment had been entered, the court should open motion and appropriate affidavits or evidence open up the judgment and allow the defendant corporation to put in its defense, is not persuasive.

The record shows that the motion to vacate and set aside the judgment of January 23, 1919, was not made until February 21, 1919. The president who had been served on January 15, 1919, was back at his office on January 25, 1919, and, yet, knowing the judgment had been entered no motion was made until almost a month thereafter, that is, on February 21, 1919. Further, in his affidavit he says

he was confined to his bed several days, etc., whereas, from January 15, 1919, when he actually went back, covers ten days time. It must be borne in mind that it is the corporation that is appealing to the discretion and indulgence of the court, and not the officer who was served. The orderly administration of justice requires diligence on the part of corporations and all citizens when formally and legally notified that litigation has been instituted against them. In the instant case, there is no evidence of ordinary care, let alone diligence.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

O'CONNOR AND THOMSON, J.J. CONCUR.

(15050)

335 - 25595

T. W. BARDACH,
Appellee,

v.

F. H. SMILEY,
APPELLANT.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 642[4]

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, T. W. Bardach, brought suit against the defendant for damages to his automobile, and on May 9, 1919, obtained judgment against him in the sum of $328.20. From that judgment this appeal was taken.

On Sunday, October 28, 1917, between 10:00 and 10:30 P.M., the plaintiff was driving his car east on the south driveway of the Midway, a boulevard in the City of Chicago. The Midway runs east and west and contains two driveways, one on the north side and one on the south side. At the same time, the defendant was driving his car, an Oakland, five passenger, six cylinder car, with a passenger, Dr. Edith Morton, north, on the east side of Woodlawn avenue, Chicago. Woodlawn avenue runs north and south and intersects the Midway.

The testimony of the plaintiff is that when he got near Woodlawn avenue he saw a car coming north in Woodlawn avenue; that he stepped on the brakes and that the collision

took place and he was thrown over on the other side of the Midway; that at the time he (the plaintiff) was driving about 25 miles an hour; that he was from 20 to 25 feet from Woodlawn avenue, when he first saw the defendant's car which, at that time, was about 60 feet south of the Midway in the middle of Woodlawn avenue and going at about 40 or 45 miles an hour; that it did not stop at the boulevard but only stopped after the collision; that as a result of the collision his, the plaintiff's car which was an open one, was tipped over on its left side and was from 20 to 25 feet east of Woodlawn avenue near the north curbing of the Midway; that his car was struck right in the center on the running board.

The evidence of the defendant is that he was taking Mr. Edith Norton, who was sitting in his car at his right, to her home; that when he first saw the plaintiff's car he, himself, was about 200 feet south of the Midway and the plaintiff's car about two blocks west of Woodlawn avenue; that he, himself, was driving along Woodlawn avenue at about five or eight feet from the curbing; that when the front end of his car got to the south line of the Midway he slowed down and threw out the clutch; that at that time the plaintiff's car was about 150 feet west of the west curb of Woodlawn avenue; that he then threw his car into gear and started ahead and had passed the center of the driveway when he heard an unusual pounding as though the plaintiff's car had suddenly been accelerated; that he looked to the left and saw plaintiff's car swerve to the north to the middle of the drive going east; that he then turned his car easterly and the plaintiff kept on until his left front wheel struck

the curb stone and careened off; that the plaintiff's car struck the left mud guard of the defendant's car and the right hub of the plaintiff's car caught the spokes of the wheel of the defendant's car and dragged it east; that the plaintiff's car continued east until it turned over; that at that time the rear of the plaintiff's car was on the north curb with the front extending over into the Midway to the south and was 43 feet east of the east curb of Woodlawn; that when the collision occurred the front end of the defendant's car was north of the center of the Midway; that when his car stopped it was about 6 feet from the north curb headed due east. He further stated that when he started to cross the boulevard his speed was about 12 to 14 miles an hour and that just before the collision he saw the plaintiff's car about 80 feet west coming at about 30 miles an hour; that after the plaintiff "stepped on the gas" the plaintiff's car shot ahead about 40 miles an hour as it crossed Woodlawn avenue. On cross examination he stated that he did not come to a dead stop at the boulevard.

A police officer, Corcoran, who at the time of the collision was standing at the southwest corner of Woodlawn and the Midway, testified that he saw the collision and that the front of the defendant's car struck the rear wheel of the plaintiff's car and turned the plaintiff's car clear around and over; that he heard no horn nor any warning; that lights were burning on both the cars and the street was well lighted; that both cars were traveling at about 25 to 30 miles an hour and that neither one stopped before the collision; that the plaintiff's car landed on its side

pointed south; that it was about 25 feet east of Woodlawn on the Midway, the rear being on the north curbing; that the defendant's car was west of the plaintiff's car when they stopped.

The passenger, Dr. Edith E. Norton, who was riding with the defendant, testified that she sat on the right hand side of the defendant in his car; that when she first saw the plaintiff's car it was 125 to 135 feet west of Woodlawn avenue; that the defendant's car was then about 30 feet south of the Midway and traveling at about 12 to 15 miles an hour; that as the defendant reached the Midway he slowed up his car but did not come to a complete stop; that as he started to cross the Midway he put the car into second speed and started ahead at about 10 miles an hour; that when the defendant's car reached about the middle of the Midway a little north of the center, the defendant turned his car east and at that time the plaintiff's car collided with the defendant's car on its left side; that the plaintiff's car turned over with its front toward the south and the defendant's car stopped about 4 feet behind it.

The evidence of Wunstrom, superintendent of an automobile repairing company, is to the effect that that company repaired the plaintiff's car and that the reasonable and fair charge for the repairs was $228.50.

The cause was tried without a jury and at the close of the evidence the trial judge, after stating that the cause of the collision was the failure of the defendant to stop at the boulevard as provided by the city ordinance, entered judg-

ment in favor of the plaintiff and against the defendant in the sum of $228.50.

It is contended by counsel for the defendant that the defendant was not guilty of any negligence proximately causing the collision and that the plaintiff was guilty of such contributory negligence as should prevent a recovery. It is provided by the city ordinance that it is unlawful to drive an automobile "on to any boulevard within the limits of the City of Chicago without first bringing such vehicle to a full and complete stop." And, it is admitted by the defendant that he did not stop when his car reached the intersection of the Midway. Of course, from that it follows that he was guilty of negligence, and there remains but the question, whether the conduct on the part of the plaintiff was negligent, and to such a degree as to prevent him from recovering notwithstanding the negligence of the defendant. We agree with the judgment of the trial judge that, although the plaintiff was driving east on the Midway at about twenty-five miles an hour, he was not, as a result of that fact alone, under the circumstances, chargeable with contributory negligence. We do not think that that rate of speed under the circumstances was unlawful. Berg v. Michell, 196 Ill. App. 309. Considering the time of night and that he was driving on a boulevard we do not consider that rate of speed, per se, unreasonable. As he approached the intersection from the west, he had a right to assume that the defendant would not drive on to the boulevard without stopping. Campbell v. Chicago City Railway Co., 212 Ill. App. 344, is not in point as in that case there was no law requir-

ing either one to stop at the intersection.

As to the motion to vacate the judgment and grant a new trial, the affidavits in support thereof do not allege such facts as show diligence, (Graham v. Magnuson, 270 Ill. 282) nor do they qualify in any material way the admission of the defendant that he failed to comply with the requirements of the city ordinance.

As to the contention that there was no evidence before the court from which the damages could be entered:- The evidence shows that the side of the plaintiff's car was smashed and the running board damaged and that the car suffered various other injuries and that all of the damages to the car were subsequently repaired by the Chicago Coach & Carriage Co. and that a reasonable and fair charge therefor was $225.86, and there is no evidence in the record contradicting the evidence on behalf of the plaintiff on that subject.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'CONNOR AND THOMSON, J.J. CONCUR.

(15062)

136 - 25390

CHARLES DAVEY,

Appellee,

v.

WARREN A. LAMSON, LESLIE F. GATES and HARRY H. LORDELL, doing business as LAMSON BROS. & CO.,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

220 I.A. 643

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of assumpsit against defendants claiming that there was a balance of $2,756.42 due him on account of some purchases and sales of corn on the Chicago Board of Trade. At the close of plaintiff's case defendants moved for a directed verdict which motion was denied. Thereupon they refused to introduce evidence. The case was submitted to the jury on plaintiff's evidence alone, and a verdict rendered in plaintiff's favor for the amount of his claim, upon which judgment was entered to reverse which defendants prosecute this appeal.

The record discloses that the defendants were members of the Chicago Board of Trade, and that they maintained an office at Dekalb, Illinois, which was in charge of their agent G. J. Chronister, through whom plaintiff bought and sold several thousand bushels of "May corn." These transactions began about November, 1915, and continued until May 31, 1916, when all the transactions were closed; During this time plaintiff, from time to time

as requested, made deposits with defendants, through their agent at DeKalb, for margins. About May 31, 1916, plaintiff received a number of statements from Chronister which showed a balance due plaintiff of $2,404.02. Shortly after that date it was discovered that Chronister had been dishonest in his dealings with defendants and absconded. Plaintiff took the matter of settlement of his account up with defendants at Chicago and payment not having been made, this suit was brought.

So far as it is material to state them, the pleadings are as follows: March 3, 1919, plaintiff, by leave of court, filed an amended declaration based on an account stated as of May 31, 1916, claiming $1864.30. To this defendants filed a plea of general issue and also a plea of the six months statute of limitations. Plaintiff filed an affidavit of claim which was also based on an account stated. A demurrer was sustained to the plea of the Statute of Limitations. Afterwards, on May 14, 1919, plaintiff, by leave of court, filed an additional count together with an affidavit of claim based on an account stated claiming a balance of $2,404.02. The case went to trial May 21, 1919, and during the progress of the trial plaintiff obtained leave and filed the common counts, and it was ordered that the plea of general issue therefore filed stand as a plea to these counts.

Defendants first contend that since the only affidavit of claim plaintiff filed was based on an account stated there was no other issue to be determined in the case, and since there was no affidavit of claim filed with the common counts, which were filed during the progress of the trial, they were unavailing. Even if we should assume that the law

is as contended for yet we are clear that they are in no position to raise the point here as it was not raised in the trial court. It is elementary that a point cannot be urged for the first time in a court of review. But defendants say that the point was raised , and that they made several objections at different times when evidence was offered, and pointed out as a ground for their objections that the suit was based on an account stated, and that the evidence offered did not tend to prove that issue. But at no time did they point out that the evidence was not admissible under the common counts for the reason that there was no affidavit of claim attached to them. Moreover, defendants having filed a plea of general issue to the common counts thereby joining issue, are in no position to say that evidence tending to sustain these counts was inadmissible. If this point had been made the affidavit could have been filed within a few moments and any claimed objections obviated. Plaintiff was not required to file an affidavit of claim unless he so desired. The purpose of such an affidavit is to require defendant to file an affidavit of merits, and if defendant fails so to do, plaintiff is entitled to a judgment on his affidavit of claim, but that is not involved here. Furthermore we think the evidence was competent under the affidavit of claim because it did tend to show that there was an account stated. The evidence objected to was statements of purchases and sales of corn showing debits, credits and balances, and which were given to plaintiff by defendants' agent, and, therefore, in the absence of anything to the contrary they would certainly tend to show the status of plaintiff's account. There is no merit in the point.

Defendants next contend that the judgment is wrong for the reason that even if the pleadings were sufficient, to admit of the evidence offered and received, yet no recovery could be had except upon the theory of a balance due on an open mutual account, and that the evidence offered and received was not sufficient upon which to base the verdict and judgment. Counsel say: "But even such a theory (mutual account) must fail in view of the fact that appellee has failed to prove a balance because he has failed to make proof of various items of the account, namely, the 'open trades' which he admits he engaged in, but the number of which and whether or not these 'open trades' resulted in a loss or profit to him he does not know or show." The evidence offered by plaintiff, and that is all that is in the case, is to the effect that plaintiff bought and sold through defendants' agent at DeKalb May corn, and that the transactions covered the period from November, 1915, to May 31, 1916; that the method of doing business was that plaintiff would deposit as margins moneys from time to time as requested; that when corn was purchased for plaintiff and later sold, both operations constituted what was known as a closed transaction; that until the corn so purchased had been sold, such purchase was known as an "open trade" or unclosed transaction. The evidence further shows that all the trades executed for plaintiff by defendants were in May corn, which the evidence further shows means that all transactions must be closed not later than the 31st day of May, and plaintiff testified that all the deals were closed at that time and that he had no transactions with defendants after that date. It follows, therefore, that

since we hold there were no open trades defendants' argument fails.

Plaintiff offered in evidence nine exhibits, six of which were accounts of purchases and sales of May corn, some showing a profit and some a loss on the deals made. Three of the exhibits showed that plaintiff had deposited with defendants as margins $2100. After striking a balance of these items they showed that plaintiff had a balance of $2404.02, which is the amount that the jury found was due plaintiff together with interest thereon. Exhibit 2 was a letter from defendants to plaintiff dated February 29, 1916, and is as follows: "At the close of business today your account on our ledger is Cr. $2319.80". But counsel for defendants argue that on that date plaintiff did not have a credit of $2319.80, but on the contrary he was indebted to defendants at that time in the sum of $757.16 and that this is shown by plaintiff's exhibit No. 16, dated May 31st, 1916, and which shows that on account of the purchase and sale of 45,000 bushels of May corn plaintiff lost $3076.96, and it is agreed by both parties that this lot of corn was bought and sold before February 29, and defendant argues that it was further agreed on the trial that this $3076.96 was not shown on defendants' ledger on February 29; that although by the letter of February 29 defendants state plaintiff had a credit of $2319.80, as a matter of fact plaintiff owed defendants more than $700. It is explained that this is "peculiar to the bookkeeping system indulged in by Board of Trade concerns," and that "the ledger account shows only '<u>closed</u>' trades and not '<u>open</u>' trades." Defendants' books were not offered in evidence

and it is clear from the statements that the 45,000 bushels of corn were bought and sold before February 29, and that this was, therefore, a closed trade. It would be a strange system of bookkeeping that would show that on February 29 plaintiff had a credit of more than $2300 when as a matter of fact he owed more than $700. Plaintiff having lost more than $3,000 on this 45,000 bushels, and the trade having been closed before February 29, he was, of course, charged with that amount before defendants gave him credit for $2319.80. If defendants' system of bookkeeping permitted of any other course, it most certainly would be, as counsel says, peculiar. But the defendants can in no event make any complaint on this account for the plaintiff again gave them credit for the $3076.96 as of May 31st, the date of the statement. We think it quite apparent that the reason defendants argue that this amount had not been charged to plaintiff prior to May 31st is the fact that on that date plaintiff received a number of statements including one for this item from defendants' agent at DeKalb. Most of these showed transactions which had long since been closed, but evidently the statements had not been given to plaintiff until that date.

It is also claimed that the judgment is wrong because plaintiff was allowed the $2100 margins he had put up with defendants. The statements made by defendants from time to time show debits and credits among them being the $2100. We know of no reason why plaintiff should not be given credit, under any system of bookkeeping, for this amount.

that it is about four the statutory sum, the defendants of more were bought and sold before February 28, and that this was, therefore, a closed trade. It would be a strange system of bookkeeping that, until after such as February 27 plaintiff had a credit of more than $2500 when on a matter of fact he owed more than $700. Plaintiff having lost more than $2,000 on this $2,000 business, and the trade having been closed before February 28, he was, of course, charged with that amount before defendants gave him credit, for $2000.00. If defendants' system of bookkeeping precludes of any other meaning, it must inevitably result in, in instant case, penalizing. That the defendants can in no event that may complained on this account for the plaintiff again gave them credit for the $2000.00 on of May 28th, the date of the statement. We think it quite apparent that the system defendants argue that this account had not been charged by plaintiff prior to May 28th is the fact that on that day plaintiff received a number of statements including one for $2000 from defendants' agent at Moline. Most of these showed transactions which had long since been closed, but evidently the statements had not been given to plaintiff until that date.

It is also claimed that the judgment is wrong because plaintiff was allowed the $2000 complaint he had put up with defendants. The statements made by defendants from time to time were brief and varied among them being the $2000. We have of no reason why plaintiff should not be given credit, under any system of bookkeeping, for this

amount.

There being no merit in the points urged by the defendants, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

170 - 29824

JOHN V. FARWELL COMPANY,
Appellee,

v.

JUSTIN KULIS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 643

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant on a written contract of guaranty claiming $357.24. To plaintiff's amended statement of claim defendant filed an affidavit of merits which, on motion of plaintiff was stricken. Defendant elected to stand by his affidavit of merits and was thereupon defaulted. The court heard the evidence and assessed the plaintiff's damages at the amount of its claim.

Defendant contends that the trial court should have continued the case by virtue of the provisions of the Act of Congress approved March 8, 1918, and known as the Soldiers and Sailors Civil Relief Act.

Plaintiff's statement of claim on which the case was tried was based on a written guaranty whereby defendant guaranteed payment for any goods which plaintiff might sell to the Kulis Furniture House of Chicago, and it was claimed that plaintiff had sold to the furniture house goods of the value of $357.24, which was long since overdue and unpaid. Defendant's affidavit of merits, which was strick-

on set up, inter alia, that on June 19, 1918, which was nine days after the last goods were sold by plaintiff to the furniture house, K. Kulis, who was doing business as the Kulis Furniture House, was drafted into the United States Army, and "to the best knowledge and belief of this defendant, the said K. Kulis is now engaged in the military service of the United States." There was no motion nor even a suggestion that the cause be continued. It follows, of course, that the court committed no error in not continuing the case on its own motion.

Defendant also argues that he should have been excused under Rule 18 of the Municipal Court from filing an affidavit of merits. That rule provides that any defendant may, in the discretion of the court, be excused from filing an affidavit of merits where it appears that the defendant is unable to secure the necessary facts upon which to base the affidavit. The obvious answer to this is that no suggestion was made that defendant be excused from filing an affidavit of merits. In fact, defendant voluntarily filed one, and when this was held insufficient he elected to stand by it.

Defendant next contends that the affidavit was sufficient and set up a good defense because it denied that defendant had received the one dollar consideration mentioned in the written guaranty. The guaranty recited that "In consideration of one dollar and other good and valuable consideration to me in hand paid by JOHN V. FARWELL COMPANY * * * receipt whereof is hereby acknowledged, I * * * guarantee" etc. Under this recital the guarantor defendant is estopped to deny that no consideration had in fact been paid. Bond v. John V. Farwell Co., 172 Fed. (C.C.A.) 58; Sears v. Swift & Co., 66

Ill. App. 496.

Defendant next argues that the affidavit set up a meritorious defense for the reason that since it appeared that the goods, to enforce payment of which this suit was brought, were sold by the plaintiff to the furniture house between June 4 and June 10, 1918, and since defendant was not notified of any default in payment until September 19, 1918, he was discharged from liability, because if he had been notified promptly he could have protected himself, and that it is the law that unless a guarantor in a contract of guaranty such as the one in question is notified promptly of any default in payment and suffers by reason of such failure, the guarantor is discharged from liability. We think it is the law that a guarantor is relieved of liability under a contract of guaranty such as the one in question where he has not been notified of the default of his principal within a reasonable time after such default, and has suffered in consequence of such failure to give notice. But in applying this rule to the case at bar, there are no facts set up in defendant's affidavit of merits tending to show that he has suffered by any failure of plaintiff to notify him of thedefault. The affidavit sets up that "if the said plaintiff had given this defendant prompt notice of any default for the payment of said account of said K. Kulis, this defendant could have recovered and collected from the said K. Kulis any sum for which this defendant might be liable under said guarantee, and that by reason of the default of said John V. Farwell Company, in promptly notifying this defendant of said default, this defendant is damaged in the sum of $357.24 if said sum is due John V. Farwell

Company from the said K. Kulis." It is clear that this is simply a conclusion of the defendant, no facts being set up. Defendant, however, has attempted to supply the deficiency of his affidavit in his behalf, where he argues that if he had been notified promptly he could have protected himself, because K. Kulis, at the time he was drafted into the Army, June 19, sold out his business for $2000 which sum was deposited in the bank and so remained for more than a month thereafter. If this fact had been set up in defendant's affidavit of merits, there would be much force in his contention, but there being no such allegation the affidavit was clearly insufficient. Moreover there is nothing in the record that shows when the purchase price for the goods sold by plaintiff to the Kulis Furniture House became due. The written contract of guaranty which defendant signed evidently contemplated that goods were to be sold on credit and for aught that appears, the amount of plaintiff's claim for which this suit was brought was not due until September 19, the date defendant says he was notified. We think the affidavit of merits was clearly insufficient and the court did not err in striking it.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

181 - 25436

HAROLD W. MARKS,
Appellee,

v.

ILLINOIS PUBLISHING & PRINTING COMPANY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 643

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages for personal injuries in the sum of $200. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for $128.57, to reverse which defendant prosecutes this appeal.

The record discloses that about 1:15 o'clock of the morning of July 11, 1919, plaintiff was driving a taxicab west on Division street at the rate of about twenty miles per hour, when a Ford truck belonging to the defendant which was being driven east in Division street collided with the taxicab and injured plaintiff. Evidence offered on behalf of plaintiff, which was all the evidence there was in the case, tended to show that at the time in question plaintiff was engaged in driving a taxicab at night and at the time of the accident was returning to his home. His cab was traveling west at about twenty miles per hour with the south or left wheels running between the rails of the north or westbound street car track in Division street. The evi-

dence also tended to show that approaching him from the west was another automobile traveling approximately in the south or eastbound track, and that defendant's auto truck was behind this other automobile, and in an endeavor to pass this other automobile defendant's truck turned out to the north to go around it. As defendant's truck was about to go pass this other automobile it was approaching plaintiff's taxicab. It was apparent that there was going to be a collision and plaintiff endeavored to turn his car off to the north and defendant's driver likewise endeavored to avoid the impending collision but it was too late. Defendant's truck struck the south side of plaintiff's taxicab and turned it over and plaintiff was removed from under the machine. There was evidence tending to show that he was injured and remained at home for eighteen or nineteen days, and also evidence tending to show what he lost by reason of his inability to attend to his customary duties.

The suit was filed on August 5, 1919, and the summons made returnable August 11, 1919. Defendant was served August 6, and when the case was called for trial on August 11 both parties appeared and defendant moved "for a continuance of the case." The motion was denied. Defendant contends this was error as it was entitled to a reasonable time in which to prepare for trial. There was no showing of any kind made as to why defendant was not prepared for trial, nor was there any showing why the case should be continued. In these circumstances, of course, we cannot say that the court erred in denying the motion.

Defendant also contends that it was incumbent upon plaintiff in order to maintain his case, to prove that the negligence of the defendant was the proximate cause of his injury, and that he himself was not guilty of contributory negligence. It is argued that the evidence fails to prove either of these elements. The only witnesses were the plaintiff and the driver of a Yellow Taxicab who was following plaintiff just prior to the accident. In support of its contention defendant argues that under the law its truck driver was justified in pulling over to the north or westbound street car track as this was necessary to pass the other automobile, and that in doing so he was following the rules of traffic which provide that the driver of an automobile in passing another machine shall do so on the left hand side. It is further argued that plaintiff testified that he was traveling at the rate of about twenty miles per hour in a built up portion of the city which was contrary to the State statute, and that this was prima facie evidence of negligence on plaintiff's part. There is some dispute between the witnesses as to the distance between plaintiff's taxicab and defendant's truck at the time the latter pulled toward the north track in passing around the other automobile. We think it would serve no useful purpose to discuss this in detail. It is sufficient to say that after a careful consideration of all the evidence we think it was a question of fact to be determined by the trial judge as to whether plaintiff was in the exercise of ordinary care for his own safety, and whether he was injured by the negligence of the defendant. We must assume, of course, that the court in determining this question took into consideration the fact that plaintiff was

Defendant also contends that it was incumbent upon plaintiff in order to maintain his case, to prove that the negligence of the defendant was the proximate cause of his injury, and that he himself was not guilty of contributory negligence. It is argued that the evidence fails to prove either of these elements. The only witnesses were the plaintiff and the driver of a similar tractor who was following plaintiff just prior to the accident. In support of his contention defendant argues that before the last driver was plaintiff in position to see the truck or manifestly direct his tractor in this was necessary to pass the other automobile, and that he also by the time reaching the point of contact which gravely the driver of an automobile in passing another should do so on the left hand side. It is further argued that plaintiff testified that he was traveling at the rate of about twenty miles per hour in a total no position of the city which was contrary to the flame statute, and that this was prima facie evidence of negligence on plaintiff's part. There is some dispute between the witnesses as to the distance between plaintiff's tractor and defendant's truck at the time the latter pulled toward the north from it proceeding toward the other automobile. We think it would serve no useful purpose to discuss this in detail. It is sufficient to say that after a careful consideration of all the evidence we think it was a question of fact to be determined by the trial judge as to whether plaintiff was in the exercise of ordinary care for his own safety, and whether he was injured by the negligence of the defendant. In some respects, it matters, that the court in determining this issue [illegible]

prima facie guilty of negligence in driving at the rate of twenty miles per hour, but found this did not contribute to the collision. The court having seen and heard the witnesses and having found against the defendant, we cannot say, upon a careful consideration of the entire record, that the finding of the trial judge is so manifestly against the weight of the evidence as to warrant a reversal.

Complaint is also made that the court committed error in unduly limiting the cross-examination of plaintiff. Plaintiff testified that when he was injured he was taken to a doctor who treated him. Upon cross-examination he was asked the following questions: "Q. Did he come to where you lived after that?" "Q. When did you see the doctor last before you went to work subsequent to this date?" "Q. Did you have any other doctor at any other time except this one that you mention?" Plaintiff objected to these questions on the ground that they were not proper cross-examination, and the objections were sustained. We think it clear that the court was wrong. Defendant had a right to prove, if he could, all of the facts as to the nature of plaintiff's injury, which might be shown by what the plaintiff did in an endeavor to be cured. It was clearly proper to show this by cross-examination, and were this a large judgment or if one considered it excessive we would not hesitate to reverse it. But there can be no question but that plaintiff was injured, and he testified that he was laid up for about eighteen or nineteen days. In these circumstances we will not disturb it.

The judgment of the Municipal Court of Chicago is affirmed. AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

194 - 28449

JAMES M. MOORE, Plaintiff in Error,	)	ERROR TO
v.	)	MUNICIPAL COURT OF CHICAGO.
T. O. BROSTED, Defendant in Error.	)	

220 I A. 643

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover rent claimed to be due under a written lease for eight months - September to April, both inclusive. There was a hearing before the court without a jury and a finding and judgment in favor of defendant to reverse which plaintiff prosecutes this writ of error. The bill of exceptions has been stricken from the record so that the case is to be decided on the common law record alone.

Plaintiff in his amended statement of claim sets up that on July 11, 1918, he, as landlord, executed a written lease with defendant, as tenant, demising certain premises in Chicago beginning August 1, 1918, and ending April 30, 1919, at a rental of $32.50 per month, payable in advance, and claiming rent due for the months from September to April both inclusive. Defendant filed an affidavit of merits setting up that he did not owe plaintiff anything; that on the date of the execution of the lease plaintiff was not the owner or agent of the owner of the premises; that he was not entitled to any rents. Defendant further set up that on October 11, 1918, the then owner of the property executed a trust deed

on the property as security for an indebtedness; that the owner of this indebtedness filed a bill on July 18, 1916, to foreclose the trust deed; that a decree of foreclosure was entered and the Master in Chancery sold the property on March 21, 1917, to one Goldsmith and issued a certificate of sale to him; that afterwards a duplicate of this certificate was recorded in the office of the Recorder of Cook County; that the original certificate was later assigned by the purchaser at the sale; that the period of redemption expired June 21, 1918, and in the following January the Master's deed issued conveying the premises to the owner of the Master's certificate. The affidavit of merits also set up that on November 11, 1915, the then owners of the premises executed a trust deed conveying the property and rents therefrom to secure an indebtedness; that afterwards a suit was filed to foreclose this trust deed in the Superior Court of Cook County, and on August 3, 1916, a receiver was appointed, in that proceeding; that an order of court was entered in that case ordering defendant to pay the rent for the premises to the receiver, and that defendant thereafter paid the rent to the receiver until the receiver was discharged and afterwards paid the rent to the owner of the property.

Since the bill of exceptions has been stricken and the case is submitted on the common law record, plaintiff argues that he was entitled to a judgment for the amount claimed by him for the reason that his statement of claim set up a good legal cause of action while the defendant's affidavit of merits did not set up any legal defense. If we assume that plaintiff's statement of claim stated a good cause of action and that defendant's affidavit of merits did

not set up a legal defense to such claim, it does not follow that the judgment of the trial court should be reversed. The common law record shows that the case was not decided upon the pleadings but that it came on for trial in the regular course before the court without a jury and the court having heard the evidence and the arguments of counsel found the issues against the plaintiff. Every presumption must be indulged in favor of the validity of the judgment and, therefore, we must presume that the court, after hearing the evidence, was warranted in finding against the plaintiff not on the question of pleadings but on the evidence adduced. It follows, therefore, that since we have not the evidence before us the judgment must be affirmed.

Moreover, we think the affidavit of merits did set up a legal defense. Of course, defendant could not question the plaintiff's title to the property, as he attempted to do by his affidavit of merits, but he had a right to allege, as he did, that in the foreclosure proceeding on the trust deed which long ante-dated the lease in question, a receiver was appointed and that he was compelled under the order of court to attorn to the receiver. But plaintiff contends that this proceeding in no way effected him because he was not a party to it. This argument, of course, is unsound because if the foreclosure proceeding was instituted and pending long before plaintiff acquired any interest in the property, anything done in that proceeding would be binding upon him. There is not sufficient before us to enable us to determine what was before the court in the foreclosure proceeding, and we must assume, therefore, that the order of that court directing defendant to pay the rent to the receiver was valid and authorized. In any view of the

case we cannot disturb the judgment of the Municipal Court of Chicago and it is, therefore, affirmed.

AFFIRMED.

TAYLOR, P.J ,AND THOMAS, J. CONCUR.

236

229 - 25486

DENNIS J. EGAN, Bailiff of the Municipal Court of Chicago, to the use of JENNIE C. MORRISON, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
HARDY HINNARD and E. G. CLANTON, On appeal of E.G. CLANTON, Appellant.	

220 I.A. 843

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Dennis J. Egan, as bailiff of the Municipal Court of Chicago for the use of Jennie C. Morrison, brought this action on a replevin bond against Hardy Hinnard and E. G. Clanton. The case was tried before the court without a jury. The court found the issues for the plaintiff and assessed damages at the sum of $800 against the defendant Clanton, the other defendant not having been served, to reverse which defendant Clanton prosecutes this appeal.

Plaintiff's statement of claim was based on a replevin bond signed by Clanton as surety in a case in which the defendant Hinnard was plaintiff and Jennie C. Morrison, the use, was defendant. It set up that in the replevin suit Hinnard took a non-suit; that a writ of <u>returno habendo</u> was awarded in that case, the writ issued, a demand made by the bailiff, and the writ returned no part satisfied. The defendant Clanton filed an affidavit of merits in which he set up that the merits of the case were not determined in the replevin suit but that Hinnard, the plaintiff in that

case, took a non-suit. The affidavit of merits then sets up that the property involved in the replevin suit did not belong to the plaintiff in that case, Minnard, but to another person. On the trial of the case at bar after plaintiff introduced the files and record in the replevin suit, and other evidence tending to show the amount of her damages, the defendant sought to introduce evidence tending to show that the property involved in the replevin suit, viz: a diamond ring, was not the property of the plaintiff in that case, Hardy Minnard, but that it belonged to another. On objection the court held this evidence inadmissible, and this is the error complained of by the defendant Clanton.

We think the court was clearly right. Where, in an action of replevin, the merits of the controversy have not been determined but the plaintiff there takes a nonsuit, the defendant, when sued upon the replevin bond, by our statute, is given leave to plead this fact and also his title to the property in dispute, but he cannot plead property in any other person than himself. Section 26, Ch. 119, R. S.; Stevison v. Earnest, 80 Ill. 513; Moller v. Collsen, 23 Ill. App. 324; Cermak v. Rudolph Wurlitzer Co., Appellate Court, First District, Gen. No. 24395; Gilbert v. Sprague, 196 Ill. 444. Section 26 of the Replevin Act provides: "When the merits of the case have not been determined in the trial of the action in which the bond was given, the defendant in an action upon the replevin bond may plead that fact and his title to the property in dispute in such action of replevin." In passing on this section our Supreme Court in the Stevison case, which was

a suit on a replevin bond, said, (p.519: "It is next objected that the judgment on which the execution levied on the property was issued was void and, therefore, the plaintiff was entitled to recover but nominal damages. We are of the opinion that the only issue before the jury was whether Stevison was the owner of the property. By permitting the suit to be dismissed he lost all right to contest plaintiff's claim to the property except that saved him by the statute, which was to plead and prove his title to the property in mitigation on damages. Beyond this he could not contest the plaintiff's title." This case was decided about 1875 and has been repeatedly referred to with approval as settling the law on this point. There is no authority to the contrary. In the Koller case, which was also a suit on a replevin bond, the court said that in a replevin suit the plaintiff must recover on the strength of his own title and not on the weakness of his adversary's, while the defendant in that case, on the contrary, may plead title to the property in a third person unconnected with himself, and that if the plaintiff in a replevin suit fails to return the property as ordered by the court and is then sued upon the bond, the only defense left him is that provided by section 26. The court there said, (p.330): "It would be a perversion of justice and a violation of the terms of his bond and the spirit and letter of the statute to allow him to depreciate the damages of the plaintiff in the suit on the replevin bond by showing the title to the property to be in another than such plaintiff * * *. We have no doubt he may plead any qualified title of his own, as well as a general title, but he may not plead such title to be in a third party."

Defendant having interposed no defense either by his affidavit of merits or by the evidence offered, it follows that the judgment of the Municipal Court of Chicago must be affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

1571a

259 - 25496

PSIMOULIS & CO., a corporation,
Appellee,

v.

INTERNATIONAL BROKERAGE CO., a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 644

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover $317.75 claimed as damages by reason of defendant, without authority, reducing a draft drawn in plaintiff's favor from $417.75 to $100. There was a verdict in plaintiff's favor for the amount of its claim. On a motion for a new trial plaintiff entered a remittitur for $26.11, and judgment was entered in plaintiff's favor for $291.64, to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff is a corporation with offices at 910 West Randolph street, Chicago, and engaged in the commission business, dealing in fruits and vegetables; that defendant is a corporation acting as a broker in the same line of business with offices at 136 West Lake street, Chicago; that about October, 1917, plaintiff and defendant entered into negotiations which resulted in defendant selling for plaintiff a carload of bulk pears to V. H. Peterson & Co. of Virginia, Minn. for $417.75. This sale was consummated through defendant's agent, R. H. Crutchfield &

Co., Minneapolis, Minn. When the carload of pears arrived at Virginia, Peterson & Co. refused to accept them on the ground that they were "small, wormy, also frozen." Crutchfield, the Minneapolis broker, notified defendant of this fact, and after some negotiations Peterson took the car for $100. The car was loaded in Michigan and when it was forwarded to Minnesota plaintiff made a draft on Peterson and sent it to a bank located in Virginia, Minn. The draft was for $417.75, the contract price for which the pears were sold. When Peterson refused to accept the pears and defendant was notified of this fact through its Minneapolis brokers, it authorized the reduction of the draft to $100. Defendant contends that it was authorized by plaintiff to make this reduction. On the other hand plaintiff's position is that no such authority was given; that plaintiff knew nothing about any reduction or that the pears had been rejected by Peterson until it received a check from the Virginia bank for $100. The only point in controversy is whether plaintiff authorized defendant to reduce the draft.

There is not much conflict in the evidence even on this point. George Poimoulis was the only witness for plaintiff. He testified that he was the president of plaintiff corporation; that after the car of pears was forwarded to Peterson he drew a draft on Peterson for $417.75 and sent it to the American Exchange Bank of Virginia, Minn., for collection. The witness was not certain whether the bill of lading for the car was attached to the draft or not. The pears were loaded in Michigan and shipped in a box car to Minnesota. There is some dispute as to whether the pears were to be shipped in a refrigerator car, but we think this is immaterial. The witness

further testified that the first intimation he had that there was any dispute about the amount plaintiff was to receive for the pears was when it received through the mails the check for $100 from the Minnesota bank; that upon receipt of it he called up defendant company and talked with A. G. DeWilde, its president, and asked him why plaintiff had received the check for $100; that DeWilde replied that when Peterson refused to accept the pears defendant was notified of that fact through Crutchfield by telegram and that he, DeWilde, called up plaintiff and talked with E. F. Harder, secretary and treasurer of plaintiff company; that"he, (DeWilde) said he had a conversation with Mr. Harder"; that DeWilde stated he explained the situation to Harder and that Harder authorized defendant to wire the bank at Virginia to reduce the draft to $100, and that since the bank did not know defendant in the transaction, Harder further authorized defendant to sign plaintiff's name to the telegram. Further on in Paicoulis' cross-examination he testified that when he talked with DeWilde at that time, he said that DeWilde told him over the telephone he, DeWilde, was not sure with whom he talked, but that he talked with someone in plaintiff's place of business. The witness further testified that Harder, who at the time of the trial was in the Army, had [illegible] authority at the time to authorize the reduction of the draft.

For defendant DeWilde testified that on October 24, 1917, he received a telegram from Crutchfield, the Minneapolis broker. The telegram was put in evidence. It stated that Peterson had refused to accept the pears but suggested that he might take them at a lower figure. The witness furthertestified that upon receipt of this telegram, he noted

plaintiff's telephone number on it and that he called up this number and talked with Harder; that he explained the situation to Harder and that Harder authorized him to dispose of the car to Peterson at the lower figure suggested and to reduce the draft; that the witness asked Harder for the name of the bank to which the draft was sent so that he could wire them; that he also told Harder the Minnesota bank did not know defendant in the transaction and, therefore, it would be necessary to sign plaintiff's name to the telegram and that this was also authorized by Harder; that thereupon defendant sent a telegram to the bank authorizing the reduction of the draft, and that upon the same day defendant wrote a letter to plaintiff where it is said:

> "Confirming our 'phone conversation of this date with your Mr. Harder, we wired the American Exchange Bank of Virginia, Minnesota as follows:
> 'Reduce our draft to read hundred dollars feb. shipping point on carload pears shipped F. M. Peterson your city.'
> Psimoulis & Company.
> Charges paid.
> (International Brokerage Co.)
> It was necessary to wire as we explained as draft on this car was made out by Psimoulis & Co. and bank would not have recognized our instructions in the matter notwithstanding our authority as your brokers.
> We also wired Crutchfield & Co., Minneapolis, Minn. what action has been taken and requested them to return expense bill properly noted so as to protect you in the advent of your filing a claim against the Railroad Company."

Defendant also offered in evidence two telegrams dated October 24 from R. B. Crutchfield & Co. to defendant. The first advised of the rejection of the car by Peterson and the second that they had adjudged the matter with Peterson for $100 and requesting that the draft be reduced at once. The witness further testified on cross-examination that until

he talked with Harder he had no knowledge of the name of the bank that had the draft in question.

Walter F. Guhl, who was Vice-president and treasurer of defendant, testified on behalf of defendant that sometime after the transaction he saw plaintiff's president and requested payment of defendant's brokerage; that Psimoulis replied that he would not pay the brokerage until he got what money he lost on the pears; that Guhl then said defendant was not responsible for the frozen condition of the pears; that Psimoulis said that if defendant would secure an affidavit from Peterson that the pears were frozen when they arrived at destination, and if he could then collect the damages from the railroad company, he would pay the brokerage; that afterwards the affidavit was obtained from Peterson to the effect that the pears were frozen; that this affidavit was presented to Psimoulis and payment demanded, but that Psimoulis refused "point blank." Psimoulis, in rebuttal, testified that he had not received defendant's letter of October 24 wherein is set out defendant's telegram to the Virginia bank authorizing the deduction of the draft. There was further evidence that tended to show that Harder, about this time, was in Kentucky, but we think it cannot be said that this evidence tends to show that Harder was out of the city on October 24.

We think all the evidence when carefully considered shows that there is very little dispute of anything that is material, and that it clearly appears that defendant's contention, viz: that it was authorized by Harder to reduce the draft is sustained, and in fact cannot be said to be even dis-

puted. The case seems to have arisen out of a misunderstanding by reason of Feimeulis not having been advised of the telephone conversation between Harder and Dewilde, and of the receipt of the defendant's letter of October 24. The verdict and judgment are against all the evidence and the judgment, therefore, will be reversed with a finding of fact.

The judgment of the Municipal Court of Chicago is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT: We find as a fact that defendant was authorized by plaintiff to reduce the draft in question to $100.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

261 - 25519

1572a

EMANUEL WEINBERGER, Administrator of the Estate of LEE WALDMAN, Deceased, Appellant, v. JOSEPH STOCKTON TRANSFER COMPANY, a corporation, Appellee.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

220 I.A. 644[2]

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Emanuel Weinberger, as administrator of the estate of Lee Waldman, deceased, brought suit to recover damages for the wrongful death of deceased against the Joseph Stockton Transfer Company, a corporation. At the close of plaintiff's case there was a directed verdict for defendant. The only question to be decided is whether the evidence, with all the legitimate and natural inferences to be drawn therefrom, was sufficient to support a verdict for the plaintiff.

Plaintiff contends that the evidence was sufficient and that the case should have gone to the jury. It appears from the evidence that the deceased was a freight handler engaged in loading and unloading freight cars on the team track of the Soneca Railroad. He was employed by the railroad company. Defendant is a teaming corporation, engaged among other things, in hauling merchandise to and from railroad freight yards. On October 10, 1917, Joseph Marek, who was employed by defendant, drove one of defendant's teams hitched to a wagon to get a load

of paper from a car which was in the Lemon Railroad's freight yards south of Taylor street in Chicago. He drove to the car and backed the rear of his wagon to the car door. The railroad company sent deceased and another man to load the paper from the car to the wagon. It was found that the bottom of the wagon bed was not even with the floor of the car and, therefore, it was necessary for deceased and the other freight handler to obtain a door or run board to place from the floor of the car into the wagon so that the paper could be moved over it. The deceased and the other man went and got the door or run board which was of sheet iron and weighed about 200 pounds. When they returned it was found that the wagon was too close to the car and Marek, the driver of the team, who was then in the car, walked out from the car into the wagon and drove the wagon away a distance of about five feet, so that the run board could be placed in position. The wagon had a high seat in front, stakes at the side, and was covered over the top with a tarpaulin. When Marek drove the team away from the car he took the lines in his hands and stood back of the seat. He then dropped the lines and deceased called him back to assist in setting the door or run board which was heavy. Marek started to walk back in the wagon for this purpose but before he reached the end, the team started to back up. Marek tried to stop them by shouting "Whoa" but the team did not stop and the deceased was caught between the car and the end of the wagon and so injured that he died the next day. The horses were gentle and had been used in teaming to and from railroad yards for some time. There was no unusual noise or anything to frighten the team and, in fact, there is no evidence that they were at all frightened. This is the substance of all the evidence in the case.

Counsel for plaintiff argues that "it was negligence for the driver to leave the horses unattended in a crowded freight yards where trains are moving, drivers are shouting, and other teams passing back and forth." But the difficulty with this statement is that there is no evidence that the yard was crowded, that trains were moving, drivers shouting, or heavy traffic. There was another team standing nereby, but the uncontradicted evidence shows that, so far as anyone observed, no such condition as plaintiff suggests existed. We think it clear that all reasonable minds would reach the conclusion that there was no negligence on the part of the driver. Therefore, it was the court's duty to direct the verdict as was done. Libby McNeill & Libby v. Cook, 222 Ill. 206. Counsel cites the case of Casey v. U. S. Express Co., 214 Pa.1, where they say the facts are somewhat similar to the facts here. In that case the driver of a team was about five feet away from the side of a freight car and deliverately backed his team up to the car without looking to see whether there was anyone between the wagon and the car. The court there said: "The simplest precaution upon the part of the driver by the mere turning of his head before backing up would have avoided the accident and the evidence as to his action in this respect clearly raises a question of negligence which was forthe jury to determine." In the instant case the driver did not back the team at all. The team was standing still when the driver went to assist the deceased at his request, and the team without any apparent cause, moved around slightly causing the wagon to back. The case is not at all in point.

The judgment of the Superior Court of Cook County is affirmed. AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

1573a

170 - 20529

MARGARET [illegible],

Appellee,

v.

HENRY ROGERS and [illegible] ROGERS,

Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 644[3]

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of forcible entry and detainer against defendants to recover possession of a three story and basement brick building containing six apartments, known as 6236 and 6238 Kimbark avenue, Chicago. There was a judgment in plaintiff's favor to reverse which defendants prosecute this appeal.

The record discloses that on September 16, 1914, plaintiff and another as tenants entered into a written lease with William and Charles Barrett, owners of the property in question. The lease demised the premises for a period beginning October 15, 1914, and expiring September 30, 1924, at a monthly rental of $300. The premises were to be used for rooming house purposes, and were so used by plaintiff until June 26, 1917, when plaintiff entered into a sub-lease with T. N. Stone and Katharine V. Stone, his wife, demising the premises to the Stones from that date until the expiration of the original lease, viz: September 30, 1924, at a monthly rental of $300. The Stones entered into possession of the premises and conducted a rooming house therein from the date of their sublease until about June 15, 1918, when they sold

out to the defendants, Robert Rogers and Ora Rogers, his wife, who entered into possession on that date and continued to conduct a rooming house from them until the trial. The lease from the owners, Charles and William Barrett, to plaintiff provided that there could be no subletting without the written consent of the landlords, and shortly before plaintiff sold out to the Stones she took the matter up with the owners of the premises to see whether they would consent to an assignment of the lease to the Stones. The landlords refused to consent to this and shortly thereafter, June 26, 1917, plaintiff, without the knowledge of the Barretts, executed a bill of sale to the Stones selling to them an undivided 96 percent interest in all the furniture and fixtures in the building for a stated consideration of $5,000, $2,500 to be paid in cash and the remaining $2,500 evidenced by notes secured by a chattel mortgage on the property. It also contained the following provision: "It is hereby understood and agreed that said Mrs. Hirschberg is not to engage in or conduct a rooming house or a hotel within a radius of three blocks from the above location for a period of three (3) years from date." On the same date plaintiff also executed a sublease to the Stones demising the premises, except one small bed room, at a monthly rental of $300 for a period commencing on that date and terminating concurrently with the original lease, September 30, 1924. At that time plaintiff also executed a power of attorney authorizing the Stones to conduct the rooming house business for her until the expiration of the original lease, and to rent or use the small bedroom reserved in the sublease. It further provided that plaintiff was not to be liable for any bills or debts contracted by the Stones. On the next day, June 27th, plaintiff

executed another bill of sale selling to the Stones the remaining four per cent interest in the furniture and fixtures in the building. On the same date plaintiff and the Stones executed an escrow agreement which provided that the original lease from the Barretts to plaintiff, the sublease from plaintiff to the Stones and a copy thereof, the bill of sale for the four per cent interest in the furniture and fixtures, and the power of attorney, were to be placed in escrow with J. M. Graham & Co. to be held by them until September 30, 1924, "or at any earlier date" that might be agreed upon by mutual consent of the parties. This escrow agreement together with the papers mentioned therein was delivered to Graham & Co. and held by them until, as nearly as we can make out from the record, about August, 1918, when they were delivered by Graham & Co. to one Smith, who later delivered them to plaintiff. Apparently this was done with the consent of Stone. Upon the execution of the sublease and the other papers, plaintiff left the premises and the Stones went into possession and conducted a rooming house business from that time until February, 1918, and paid the monthly rental of $300 to McKey & Foague, agents for the landlords. The agents gave receipts to Stone for the various payments, which receipts ran to plaintiff. Apparently no information was given to McKey & Foague or the landlords that plaintiff had sold the furniture and the business to the Stones. In February, 1918, Mrs. Stone, who seems to have been principally in charge of the business, her husband being employed as a traveling salesman, became ill and unable to carry on the business, and the Stones then got defendants to take charge of the business for them, which arrangement continued

until about June 15, 1918, when the Stones sold out to defendants. From that date on defendants were in exclusive possession of the premises. They continued to conduct the business and paid the monthly rent to McKey & Teague obtaining receipts from them which ran to plaintiff, except the receipt for the rent for the month of August, 1919, when defendants took the matter up with the landlords and explained the situation to them. The landlords accepted defendants as their tenants and advised McKey & Teague to accept the rent from Rogers and issue receipts therefor. Shortly after June 15, 1918, when Rogers bought out the Stones, there was some correspondence between Graham, representing plaintiff, and Stone who was then located in Iowa, with reference to a foreclosure of the chattel mortgage on the furniture for the balance due on the purchase price and at that time plaintiff was advised through her agent that Rogers claimed to own the furniture and fixtures, having purchased them from Stone. Thereafter, during the latter part of 1918 and until August, 1919, Rogers paid several chattel mortgage notes to plaintiff, so that it appears that plaintiff has been fully paid for her furniture. June 17, 1919, plaintiff caused to be served on the defendants a written notice advising them that their tenancy would be terminated July 31, 1919, and demanding possession on that date. During the course of the trial, from questions asked by the court of counsel for defendant, it appears that the court was of opinion that the fact that the landlords could still hold plaintiff for rent in case of nonpayment by the parties in possession, was of considerable weight if not controlling. Of course, the landlords, not having consented to Mrs. Kirschberg subletting the premises, could hold her for the rent, but that would in no

way tend to determine whether Mrs. Hirschberg has sold her interest in the premises to other parties. There is no reason why Mrs. Hirschberg could not sell her interest in the property to anyone who was willing to assume the risk of being ejected by the landlords, and of course this would not release her of her liability to the landlords.

Counsel for plaintiff argues that there was no sublease to the Stones for the reason that that lease was not signed by them, but was signed by Mrs. Hirschberg only. With this contention we cannot agree. The lease was signed only by Mrs. Hirschberg, but it is not necessary that it be signed by the Stones since it was delivered, and the Stones went into possession under it. Delivery was made by both parties putting it in escrow with Graham & Co. This was sufficient. There is no reason why the lease was not binding. It is not necessary for a tenant to sign a lease to make it binding. Henderson v. Virden Coal Co., 78 Ill. App. 437; Bergeine v. Villani, 117 Ill. App. 373. But even if there was no attempt to make a sublease to the Stones, she could not maintain this action of forcible detainer and obtain possession of the premises, for she sold out all the furniture and fixtures in the place and agreed not to conduct any rooming house or hotel within a radius of three blocks of the building in question within three years. After she sold out to the Stones, under the circumstances disclosed by the evidence, she could not as against the Stones, or anyone purchasing from them, again re-possess herself of the premises.

It is clear that the transaction between Mrs. Hirsch-

berg and the Stones was a sale of the personal property and a subleasing of the premises for the balance of the term reserved in the original lease, and the various documents that the parties drew and what they did was a mere subterfuge intended to cover up the real nature of the transaction in case the landlords should object. The court will not be misled by matters of form but will look to the substance of the transaction. The reservation of a bedroom in the sublease, the sale of different percentages of the personal property at different times, and the power of attorney were all executed for the purpose of disguising the truth of the situation and this will not be permitted in a court of justice. The real transaction will be sought out and enforced. Whatever rights, if any, Mrs. Hirschberg had against the Stones in case they defaulted is of no importance here, and whatever rights, if any she may have had against Rogers have been waived, for she knew in June, 1918, that defendants were claiming to own the furniture and fixtures and were in possession of the premises, and after that time, with knowledge of these facts she accepted payment from them of about fourteen notes of $100 each, being the balance due her on the purchase price of the furniture. In view of this, she will not now be permitted to say that she has any claim against defendants to the premises in question. There is no merit in her contentions.

The judgment of the Municipal Court of Chicago will be reversed with findings of fact.

REVERSED WITH FINDINGS OF FACT.

TAYLOR, P.J. AND THOMSON, J. DISSENT.

FINDINGS OF FACT: We find as ultimate facts that Mrs. Hirsch-

berg sold the personal property to the Stones and executed to them a valid sublease; that the Stones afterwards sold out to defendants, and that defendants paid Mrs. Hirschberg the balance due her for the purchase price of the furniture; that the Stones delivered possession of the premises in question to defendants and that Mrs. Hirschberg knew the defendants were in possession and permitted that possession to continue and received payments from defendants on the contract for the sale of her furniture, with knowledge that they were in possession of these premises and paying rent therefore to the owners of the building.

1512-2

279 - 25837

GEORGE LOVINGER,

Appellee,

v.

HARRY KAPLAN,

Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

220 I.A. 644

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages for personal injuries claimed to have been sustained by him by reason of the defendant negligently leaving an opening at the top of the steps of a building owned by defendant. There was a verdict and judgment in plaintiff's favor for $2300 to reverse which defendant prosecutes this appeal.

The defendant was constructing a three story and basement brick building at 2642 Iowa street, Chicago. The building was practially completed. All of the walls were built, the roof was on and with the exception of putting in the doors and windows, finishing up the interior and some other details nothing remained to be done. Nine stone steps lead from the sidewalk to the entrance of the building, which was about eight feet above the ground. These steps were in place but a cement or stone slab was to be placed from the top step to the entrance or door. The slab was not laid at the time of the accident. Plaintiff was injured Saturday afternoon, April 15, 1916, about 6:30 P.M. On that day he and his wife were out looking for a flat and observed a sign

an defendant's building. He was unable to read all of the sign from the sidewalk and ascended the steps. Failing to notice the absence of the slab from the top step to the entrance he fell into the open space and his left knee was severely injured.

Defendant contends that at the close of all the evidence the court should have directed a verdict for him as requested, and that the refusal to do so was error for the reason that all of the evidence shows that plaintiff in entering the premises, under the circumstances, was a trespasser or mere licensee, and that in such case the defendant owed him no duty except not to wilfully or wantonly injure him; that there was no evidence or claim that plaintiff was wilfully or wantonly injured. On the other hand plaintiff's position is that the evidence discloses that he was entering the premises at the invitation of defendant, and in such circumstances it was the duty of defendant to exercise ordinary care toward him.

Plaintiff concedes that if under the law he was a trespasser or licensee no recovery can be had. The sole question, therefore, to be determined in the instant case is whether plaintiff at the time and place in question entered the premises at the invitation, either express or implied, of the defendant.

In determining whether a directed verdict should have been returned all of the evidence is to be considered in its most favorable aspect to plaintiff, and all conflicts are to be resolved in his favor. The question of the preponderance of the

evidence does not arise at all. Cunningham v. I. St. L. & E. R. R. Co., 266 Ill. 599; Libby, McNeill & Libby v. Cook, 222 Ill. 206.

The declaration, which was in one count, alleged the ownership of the building in defendant and that defendant placed a "FOR RENT" sign in a window of the building in a conspicuous place, so that prospective tenants could see it, and "that it then and there became the duty of the said defendant to have and keep the said apartment building in such condition as to render the same safe and proper for prospective tenants to enter and inspect the same"; that the defendant neglected such duty and negligently left unenclosed a large opening at the top of the steps leading to the building; that plaintiff in the exercise of ordinary care for his own safety and "while about to enter the building with a view of renting the same" fell into the opening and was injured.

Plaintiff testified that on Saturday afternoon, April 15, 1916, he and his wife went out looking for a flat to rent; that he saw a cardboard sign extending about two feet out over the sidewalk attached to the front porch of the building and about fourteen feet above the sidewalk. The original sign is in the record and contains the following:

"FLAT
To Rent
Inquire, 2643 Iowa St."

The words "Flat", "To Rent" and "Inquire" were printed and the address was written in lead pencil. Plaintiff further testified that he could see that the building was not completed and that there were no doors or windows in place; that he could look into the hallway through the opening where the

door was to be and saw that the hallway was plastered; that when he arrived at the building, about 6:30 P.M., he saw this sign but could not read that part of it written in lead pencil which purported to state where plaintiff might inquire about renting the flat; that to enable him to read this he proceeded to walk up the steps leading to the building at an ordinary gait watching his steps and looking straight ahead; that as he reached the top he stepped through the opening and fell into the hole which was about seven feet deep; that his left knee was fractured; that he was unable to get out of the hole until assistance came and that he was then taken home and later to a hospital. He further testified that his eyesight was good and that he never wore glasses; that the day of the accident was a nice bright day and that the sun had not set at the time he was injured; that the opening was two and onehalf or three feet wide and six feet long - the width of the steps; that as a result of the injury he was laid up from the date of the accident until July 5 following, when he returned to work. The evidence shows that he is permanently injured. On cross-examination he testified that he intended to go in through the front doorway into the hall, then through an adjoining room and out on the front porch and pass over to the porch railing close to the sign so he could read it. The defendant testified in his own behalf to the uncompleted condition of the building, and there is no substantial difference in this regard between his testimony and that of the plaintiff. He further testified that about 6:30 P.M. on the day in question he placed a barricade at the foot of the steps, and that there was a plank from the top step to the door over the open

space into which plaintiff fell; that the "FOR RENT" sign was about seven feet six inches above the sidewalk and could be read from the sidewalk. In rebuttal, a witness for plaintiff testified that the sign was about thirteen or fourteen feet above the sidewalk. There was also testimony tending to show that at the time plaintiff was injured there was no barricade in front of the steps and no plank over the opening. This was all of the evidence except the testimony of the surgeon who attended plaintiff.

In considering whether the court should have directed a verdict for the defendant, we must look at all the evidence in the aspect most favorable to plaintiff. We must, therefore, assume that it was apparent to all that the building was under construction and not yet completed; that the doors and windows had not been installed but the spaces for them were open. We must also assume that the evidence established the fact that the "FOR RENT" sign was about fourteen feet above the sidewalk and that plaintiff could not read that part written in pencil, and that his eyesight was good; that for the sole purpose of enabling him to read the sign, and not for the purpose of inspecting the apartment, plaintiff attempted to enter the building intending to go in through the doorway into the hall, then through another doorway to an adjoining room, then through a third doorway out on the porch and over to the sign where he could read it; that in ascending the steps he did so at an ordinary gait, watching his steps and looking straight ahead, and that he was severely injured by reason of falling into the opening at the top of the steps. The question then is whether these facts tend to show that plaintiff was entering the premises at the invitation, either express or implied, of the defendant. If they do, then the

court was right in denying defendant's motion for a directed verdict, unless it can be said, as defendant contends, that the evidence shows that plaintiff was guilty of contributory negligence. Upon a consideration of all the evidence, we think the court was warranted in submitting this latter issue to the jury. We might say in passing, although the point is not made, that plaintiff's theory on the trial, viz: that he was entering the premises not to inspect the apartment but for the sole purpose of enabling him to read the sign, is not in accordance with the allegations of his declaration. For it is there alleged that it was defendant's duty to see that the building was in a safe and proper condition to permit prospective tenants to enter and inspect it; that the defendant neglected this duty, and while plaintiff was about to enter the building with a view of renting it he was injured.

It is conceded that the owner of premises owes no duty to exercise ordinary care for the safety of persons who may be upon his premises as trespassers or licensees. Faukner v. Hakem, 231 Ill. 276, Gibson v. Leonard, 143 Ill. 182. And it is also the law that if a person is on another's premises as a trespasser or licensee, the only duty the owner owes to him is not to wilfully or wantonly injure him. Cunningham v. I. St. L. & W. R. R. Co., supra. The duty of the owner to a licensee or trespasser is the same. Faukner v. Hakem, supra. Plaintiff's position is, as stated by his counsel, that the defendant "By posting his sign where he did, to be read, he invited the plaintiff as a prospective tenant to come close enough in any reasonable way, to obtain the information he invited the plaintiff to obtain. And that is just what plaintiff did. In what more reasonable way could he have approached

the sign than he did? What route would have been more foreseeable that prospective tenants would take?"; that plaintiff could not read the sign from the sidewalk and, therefore, was invited by defendant to go into the building and out on the porch to read it. With this argument we cannot agree. We think it obvious that defendant contemplated that the sign should be read from the sidewalk. It certainly could not reasonably be contemplated that defendant intended prospective tenants would go into an uncompleted building where there were more or less dangers and pitfalls, to enable them to read the sign extending over the sidewalk, and if they attempted to do so and were injured through no fault of their own, he would be required to pay damages. In the instant case, according to plaintiff's contention, to enable him to read the sign he would have to walk up the steps, through the doorway into the hall, through another door into an adjoining room, pass out through a third doorway to the porch and then over to the sign. From an examination of the record it appears that the building was so constructed that the route contemplated by plaintiff was the only feasible one by means of which he could get from the street to the porch. It is clear to us that plaintiff was not invited by defendant to enter the premises and, therefore, defendant is in no way liable to pay damages for the unfortunate accident.

The judgment of the Superior Court of Cook County is reversed.

REVERSED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

307 - 25565

J. B. WILLIAMS CO.,
a corporation,

Appellant,

v.

SAM SAMSON,

Appellee.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

220 I.A. 614[5]

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit in the Municipal Court of Chicago against defendant to recover $181.25 for soap sold and delivered. The case was tried before the court without a jury and there was a finding and judgment in favor of plaintiff for $156.45. Dissatisfied with this judgment, plaintiff prosecutes this appeal.

As the case went to trial the only matter in controversy was whether plaintiff had sold the soap at fifty-two and one-half cents per pound, as it contended or at forty-three and nine-tenths cents per pound as defendant maintained. At the close of the plaintiff's case defendant withdrew his claim for a set-off and moved for a finding in his favor. This motion was apparently denied for the court made a finding in favor of plaintiff for $156.45, this being the amount due according to defendant's contention.

A witness for the plaintiff testified that he called at defendant's place of business and sold the soap; that nothing

was said about the price but at that time the witness filled out a blank bill showing the quantity sold and the price, which was 5½¢ per pound. The bill was itemized and showed a total of $151.25. A copy of this was given to defendant at the time the sale was made. The court seemed to be of the opinion that since nothing specific was said about the purchase price, plaintiff had failed to make out a case. This, of course, was clearly error for the bill which was handed to defendant at the time set forth in detail the quantity and price of the soap sold and the amount of the bill. This was sufficient since it is admitted that the soap was afterward delivered and accepted by defendant, but not paid for. Plaintiff also offered evidence tending to show the reasonable value of the soap at the time of the sale. This had nothing to do with the case and only tended to confuse. The same argument is made here, that the court erred in refusing evidence tending to show the value of the soap. We are not at all interested in the value, and whether it was more or less than the sale price is beside the point. The only question we have to determine is what was the price at which the soap was sold.

It is clear that plaintiff made out a <u>prima facie</u> case and since there was no evidence offered by defendant, except its admission in its affidavit of merits, there was no warrant for entering judgment in favor of plaintiff for $150.45. Plaintiff having made out a <u>prima facie</u> case was entitled to judgment for the amount of its claim unless defendant went forward with evidence and showed that the price agreed to be

paid for the soap was less than plaintiff claimed. Of course, under the ruling of the court, defendant made no attempt to do this.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

334 - 25598

1516a

PETER ANICLA,
Appellee,

v.

NICK MUCHRINO,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

220 I.A. 645

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages for breach of warranty in the sale of a second-hand automobile truck. There was a verdict and judgment in favor of plaintiff for $350.00 to reverse which defendant prosecutes this appeal.

Plaintiff alleged in his declaration that he purchased from defendant, for $115.00, a second-hand automobile truck warranted to be in good condition; that as a matter of fact the truck was of no value at all. The damages were laid in the sum of $3,000.00. Issue was joined and it appears from the evidence that about June, 1916, plaintiff called on defendant in reference to the purchase of the truck; that the defendant exhibited the truck to plaintiff who took it out for a trial trip and on the same day purchased it for $115.00. The next day he attempted to use it again but after driving it three or four blocks the car stopped and he was unable to start it. He was forced to haul it back to his barn with a team of horses. He didd not use the truck after that. The evidence further

tends to show that the truck was of no value. Plaintiff testified that at the time he purchased the truck defendant said: "'If you take, I will give you a guarantee for the truck; no good, I will take the truck back.' They show me truck. I said: 'No use showing me truck, I don't understand the truck; if the truck is all right, I take it.' He said: 'If the truck no good, I will take back - I will be responsible.'" Under this evidence taken in the most favorable light to plaintiff, the most that plaintiff could recover would be $115.00 upon his return or offer to return the truck to defendant.

Instruction No. 1 given on behalf of the plaintiff told the jury that if the seller was informed that the purchaser knew nothing about automobiles and must depend entirely upon the seller in getting one suitable for his purpose, the buyer had a right to rely upon the representations of the seller as to the quality of the machine. This instruction was erroneous for the reason that it had no application to the case. The suit was based on the breach of an express warranty. The only question to be determined was whether there had been such a warranty and a breach of it, and the amount of plaintiff's damages, if any. Instruction No. 8 given on behalf of defendant, which told the jury that in weighing the evidence of plaintiff they had a right to take into consideration the fact that he was the plaintiff and financially interested in the outcome of the suit, and that another rule of law also applied to defendant, was inapt for it is clear that the court meant to say that the same rule applied to the defendant rather than another or different rule.

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Defendant contends that the judgment should have been arrested because the praecipe and summons were in case while the declaration was partly in case and partly in assumpsit. Whatever may be said as to the merits of this contention it cannot now be considered as it was not raised at the proper time. Defendant having filed a plea of the general issue cannot now complain of formal defects in the pleadings. G.U.T. Co. v. Mahoney, 230 Ill. 562.

For the reasons given the judgment of the Circuit Court of Cook County will be reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

1517a

139 - 25393

LEON BITNER,

Appellee,

v.

THE PULLMAN COMPANY, a corp.,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

220 I.A. 645 2

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Bitner, brought this action against the defendant company, to recover damages which he alleged were caused by the negligence of its employees in the shop where the plaintiff also was employed. There was a verdict finding the defendant guilty and assessing the plaintiff's damages at $5,000, followed by a judgment against the defendant for that amount, to reverse which this appeal has been perfected.

The defendant has raised several points in support of this appeal but in our view of the case it will be necessary to pass upon only one of them. One of the defendant's contentions on the trial of the case was that the plaintiff's cause of action had been released by him. In our opinion, the verdict to the contrary, is against the manifest weight of the evidence on this point.

The plaintiff was injured on September 11, 1915 and he was unable to work during the following three or four weeks. He was cared for by the defendant's doctor and also

by his own. Under date of October 9, 1915, the doctors of the defendant company, certified to the superintendent that they had examined him on the 4th. and found him entirely recovered from the injuries he had received. He then returned to work for the defendant, doing lighter work for a time. The plaintiff presented this letter or certification by the doctor, to the assistant attorney representing the defendant on the same day, October 9, and asked him what the company could do for him. The attorney got from the plaintiff the details involved and told the plaintiff he would find out what could be done and if the plaintiff would return in about a week he would let him know. The plaintiff again called upon the attorney on October 22, and the evidence is in conflict as to what took place at that time. The attorney testified that he told the plaintiff the company would pay him $100. This represented approximately his loss in wages. The company had paid his doctor's bills. The attorney further testified that at first the plaintiff said $100 was not enough, for although he felt all right then and had returned to work, he could not tell how he might feel later, but that after some reflection he agreed to accept the amount offered; that he directed a stenographer to prepare a release, which she did, and he handed it to the plaintiff who started to read it apparently; that when he reached that part of the release which recited that "No promise of employment, either present or future has been made or forms any part of the consideration of, or inducement to, the foregoing release, "the plaintiff objected, saying he wanted a steady job; that the witness then read the language of the release to the plaintiff and explained that the company was unwilling to make a contract of employ-

ment with him but that he would help him get another job if he was laid off, and that the plaintiff then signed the release, his signature being witnessed by one Nelson, a file clerk and also himself. The release recited that in consideration of $100 paid to him by the company, the plaintiff did "acknowledge full satisfaction of the injury and hereby release the said company * * * from and on account of any and all claim or claims for damages on account of such personal injury and any complications arising, or which may arise, therefrom."

The attorney was obliged to send the release to the main office of the company and he received the check for the plaintiff in a few days and gave it to him personally. The plaintiff took the check away with him and his wife later cashed it. It was in the usual form of a voucher check with one fold in it. On the inside, the check contained this language, "For amount in full settlement of all claims and demands of every nature and character whatever in favor of Leon Buttner against the Pullman Company to the date hereof, including particularly full satisfaction of all damage arising by reason of injuries received on or about September 11, 1915, while employed in Calumet shops of the Pullman Company, at Chicago, Illinois." The attorney testified that this language was typewritten in the check at the time he gave it to the plaintiff. One Williston, testified that this voucher check was prepared at his direction and contained his signature and he produced the letter press copy of the check involved here, showing theppresence of the language quoted.

The stenographer also testified, corroborating

the defendant's attorney as to the conversations the latter testified he had with the plaintiff. She said she had prepared the release at the attorney's direction and that she called the clerk, Mr. Nelson, to act as a witness. On direct examination she testified that after she had prepared the release she handed it to the attorney, who in turn handed it "to Mr. Bittner to read * * * Mr. Bittner read it and handed it back to Mr. Haimowitz * * * He made a comment concerning the employment clause * * * saying he thought he ought to have a contract for employment,- Mr. Haimowitz told him he could not make a contract, he would do the very best he could for him * * * Then Mr. Bittner signed the release." On cross examination she was asked, "You don't know whether he could read English or not, you are judging from his actions just at that time?" and she replied, "Judging from his actions, yes sir, he apparently seemed to understand it * * * because he asked about the employment * * * Haimowitz told him he could not give him a contract for a job but he would do the very best he could."

One Morrison, a gang foreman employed by the defendant, testified that the plaintiff worked in his department; that in connection with that work, cards were issued to him. He was then asked, "Could you tell, coming in contact with Mr. Bittner, whether he could read or write English?" and his answer was, "I think so". He testified that he based that opinion on the fact that the cards referred to were made out in English, showing the date the car was received in the shop, the name of the car and when it was to be shipped and the class of repair the car was to get. He testified further that cards of this kind would be given to Mr. Bittner, in

the regular course of their work, twice a week and that Mr. Bittner never asked him to interpret or read his card for him, but that he would do the work called for in due course. The witness explained, on cross-examination, that these cards did not designate what work was to be done but gave the class of repair required in general, this classification being designated by the letter "M", for minor repairs and "G" for general repairs.

It was admitted, the witness Nelson being absent in the military service, that, if present, he would testify that he was introduced to the plaintiff prior to the execution of the release and that the plaintiff signed it in his presence and that it was stated in his presence and in the presence of the plaintiff that the latter had made settlement with the defendant for the injuries received by him and that the plaintiff was about to execute a release therefor, which execution he was requested to witness.

The plaintiff testified that when the attorney handed him the paper (release) he said "You have to sign this receipt"; that he looked it all over and the attorney asked, "Why,- are you scared to sign? * * * I cannot give you the money without signing this. I have to show the receipt down town, and have this receipt and give you the money"; that the attorney did not read it to him before he signed it; that he was not told the paper was a release or that in signing it, he was releasing all his claims against the Company, and that, in substance, he did not know it was a release but merely something the attorney had to have to show so he could get the money he had lost as wages. He testified further that at the time he signed

the alleged release, he could not read English and that nobody translated it into his native language or read it to him. He testified that the voucher check contained his endorsement on the back and that when he got it he gave it to his wife who cashed it at the bank. He was positive in his statements that at the time he had this voucher check, the language which we have quoted above was not on it. The plaintiff's wife later testified that she thought the language in question "was there at that time the same as it is now."

It appears further from the testimony that about ten days after the plaintiff received the voucher check he went to see the defendant's attorney from whom he had received it and said his work was too heavy and, through the attorney, it was arranged that he be given lighter work. In the following April, the plaintiff suffered an attack of stomach ulcers and his attorney, after his recovery from that attack, again helped him get some lighter work, Still later, in the fall of the year after the accident in question, the plaintiff suffered another attack of ulcers, and he again visited this attorney and said his loss of time was amounting to so much he wanted to get some relief and the attorney testified he took the matter up with the defendant's officials and as a result gave the plaintiff's wife another voucher check for $200 which recited that it was given "as special allowance on account of sickness and unemployment given in recognition of good record in the service of the Company." During all of this time nothing was ever said by the plaintiff to the attorney, so far as the evidence shows, as to any further claim by the plaintiff or payment by the company as compensation for the injuries in question.

The plaintiff was by no means an ignorant man. It was admitted, on the contrary, that he was an educated, skilled mechanic and a graduate of a "mechanical school" in Poland, having received his diploma at the age of 18 years. At the time of the accident in question the plaintiff had been in this country for nine years and for seven and one-half years he had been in the employ of the defendant, working most of the time as a skilled mechanic in the electrical department. The plaintiff testified that he learned to speak English after coming to this country. He was asked whether he could understand English at the time he was hurt and he answered "Yes, I understand a little, but not much, not all the words." He was asked further whether he could read the English newspapers and he answered, "Now, yes, a little better, but four years ago I couldn't read everything * * * just a little."

That the plaintiff executed the release in question, is not denied. That being true, to avoid the effect of the release, the plaintiff must prove by a preponderance of the evidence that the defendant was guilty of some fraud touching the execution of the instrument. Papke v. Hammond Co., 192 Ill. 631; Woodbury vs. U. S. Casualty Co., 284 Ill. 227; Miller v. St. Louis, Springfield & Peoria Rd. Co., 176 Ill. App. 439. We cannot concern ourselves with the question of whether the release, in our opinion, involved a fair adjustment of the claim. It is immaterial that the plaintiff may have thought he was signing something other than a release unless it can be shown that such a belief on his part was fraudulently induced by the defendant. Pawnee Coal Co. v. Royce, 184 Ill. 402.

Even on the testimony for the plaintiff and in view of such facts in the case as are not controverted, no such fraud on the part of the defendants as is necessary to be shown, if this release is to be avoided, was made out. On its face the paper purports to be a release and so plainly that its language could not possibly be misunderstood. Even if the plaintiff was unable to read English, he could not avoid the release if no fraud was practiced upon him by the defendant. It was his duty to have the document read or translated to him before he executed it. 23 Ruling Case Law p. 387; Schulman v. Moser, 284 Ill. 134; Guerra v. Rocco, 181 Ill. App. 528. But, in our view of the record, the manifest weight of the evidence is to the effect that the plaintiff could read English at the time he executed this release, at least well enough to understand the effect of that document, and that at the time he executed it, he knew just what it was, and what was meant by its terms. The only witness to the contrary was the plaintiff himself. Opposed to him we have four witnesses, two testifying that they were present when Bittner signed the release and that he himself read it, making some objection when he reached the clause referring to employment; one witness testifying that upon such objection being made, he read the language over to Mr. Bittner and explained it to him; another witness testifying that when he was asked to sign the release, as a witness to the signature of Bittner, it was explained that the plaintiff had reached a settlement with the defendant, and he was about to execute a release; and the fourth witness testifying that from his experience with Bittner, as his foreman, he would say that Bittner was able to read English, basing his opinion on the fact that Bittner had always been able to read the

cards, used in the shop in connection with the repair of cars, which cards, it was true, contained merely figures and letters designating the class of repairs to be made and the names of the cars. Counsel for the plaintiff contend that there is an important contradiction in the testimony of the attorney Maimowitz and the stenographer, the former testifying to the fact that he read the language of the release to Bittner and explained it to him, after the latter had raised an objection about the employment clause; and the stenographer omitting any reference to that in her description of what occurred at that time, and upon being asked whether she had stated everything that had occurred she said that she had. We do not attach great significance to that discrepancy. The stenographer was not asked, on either direct or cross examination, whether Mr. Maimowitz read any part of the release to Mr. Bittner.

The conduct of the plaintiff, after his execution of the release, furnishes further indication of the fact that he knew he had no further claim against the defendant because of the injury in question. It is hard to account for his attitude, as we have above referred to it, on any other theory. The judgment of the Superior Court is reversed with a finding of fact. Miller v. St. Louis, Springfield & Peoria R. R. Co., 176 Ill. App. 439.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT: We find as a fact that the execution of the release by the plaintiff was not induced in any manner by any deception or fraud of the defendant and that, at the time he executed it, he knew it was a release and appreciated it effect.

15180

207 - 25462

OLIVER W. FITTS,

Appellee,

vs.

JOHN E. SHATFORD,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

220 I.A. 645 3

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Fitts, brought this action of the fourth class in the Municipal Court of Chicago against the defendant Shatford, seeking to recover the principal and interest alleged to be due on a promissory note for $500. On motion of the plaintiff, the court struck the defendant's amended affidavit of merits from the files, holding that it failed to set forth a good defense to the plaintiff's right of action on the note. The bill of exceptions fails to show any objection interposed by the defendant to the action of the court in striking the affidavit of merits. The defendant elected to stand on his affidavit and the court then announced that judgment would be entered for the plaintiff "for five hundred dollars and interest, for want of affidavit of merits." Judgment was accordingly entered in the sum of $540.

In support of the appeal from that judgment the defendant contends that it was error to enter the judgment by default for want of an affidavit of merits, but that the judgment should have been a judgment nil dicit for want of affidavit of

merits. The judgment, as entered by the trial court, was irregular but such irregularity is not ground for reversing the judgment. Mann v. Brown, 263 Ill. 394; Pfaff v. Pacific Express Co., 251 Ill. 243.

While the defendant interposed no objection to the action of the trial court, in striking his affidavit of merits, we have considered the case as though such objection had been duly made. In our opinion the case of Fitts v. Stratford and Sawyer, Ill. App. First District, No. 24500, not yet reported, opinion filed July 2, 1919, is not in point here, as the affidavit of merits involved in the case cited and the one involved in the case at bar are not at all the same. The amended affidavit of merits stricken from the files by the trial court in the case at bar read as follows:

"Defendant admits signing the note in question, but defendant states that there was fraud on the part of the plaintiff in causing defendant to sign and procure from defendant the note in question, and that therefore there has been an entire failure of consideration for the instrument. Defendant further states that the fraud on the part of the plaintiff was as follows: Plaintiff warranted that he, the plaintiff, as owner of certain shares of stock to a face value of $10,000 in a corporation known as the New Process Refining Company, incorporated under the laws of the State of Illinois, of which corporation plaintiff was President, had paid into the corporation the sum of $10,000 in cash or currency, and that plaintiff had not paid into said corporation said sum of $10,000 but had only paid into the treasury of said corporation and to the Treasurer thereof a sum not to exceed $2,000, and therefore the corporation was worth $8,000 less than represented

and warranted by the plaintiff, no one else having paid the said sum so warranted to have been paid by the plaintiff; the plaintiff by virtue of his position as President of the said corporation was in a position to issue stock certificates and issued and caused to be issued stock certificates to him to a face value of $16,000, which stock was not paid for by plaintiff or any one else to the value of $10,000, and but a small sum not to exceed $2,000, had been actually paid therefor; that on or shortly after the time the note in question was given by defendant to plaintiff, an Illinois corporation known as the Great Northern Refining Company was being formed, which corporation was taking over the assets and liabilities of the said New Process Refining Company; that the plaintiff by his warranties as aforesaid caused to be exchanged to him for plaintiff's stock certificates in the New Process Refining Company as aforesaid by defendant in his official capacity as an officer of the said Great Northern Refining Company, stock certificates to a face value of $10,000, in the Great Northern Company, and that due to the fraud, misrepresentations and false warranties of plaintiff, plaintiff secured stock in the said Great Northern Refining Company wrongfully and improperly; that the defendant must make good to the Great Northern Refining Company the sum it failed to receive from the said Fitts, which is due the said Great Northern Refining Company as successor to the New Process Refining Company, and therefore the consideration on the said note has utterly failed because of the misrepresentations of plaintiff as aforesaid. Defendant hereby tenders to plaintiff the stock certificates given defendant by plaintiff in and for the note herein sued on."

In our opinion the court did not err in striking this affidavit. It is impossible to tell from its language

what connection there was between the stock transactions referred to and the note sued upon. The only suggestion on that subject is the final sentence to the effect that the defendant tenders to the plaintiff the stock certificates given to the defendant by the plaintiff in and for the note herein sued on but nowhere in the affidavit of merits does the defendant set forth what stock certificates were given to him by the plaintiff for the note sued on, nor is it alleged that the giving of the note was a part of the stock transactions described in the affidavit, and nowhere in the affidavit does the defendant allege that he relied on the warranties or representations of the plaintiff, referred to in the affidavit, nor does the defendant state that he was not aware of the real situation with regard to the stock, as he alleges it to have been represented by the plaintiff.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

1519a

2C8 - 25463

CLIVER W. FITTS,

Appellee,

v.

JOHN E. SHAYCOUD,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

220 I.A. 643

MR. JUSTICE THOMSON delivered the opinion of the court.

The issues involved on this appeal are identical with those involved in case No. 25460, in which opinion has been filed this day.

For the reasons stated, the judgment of the Municipal Court, appealed from in the case at bar is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

269 - 25464

OLIVER W. FITYE,

Appellee,

v.

CLARENCE S. SAWYER,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

220 I.A. 645

MR. JUSTICE THOMSON delivered the opinion of the court.

The issues involved on this appeal are identical with those involved in case No. 25462, in which opinion has been filed this day.

For the reasons there stated, the judgment of the Municipal Court, appealed from in the case at bar, is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

No. 25463

OLIVER W. VITIS,
Appellee,

v.

CLARENCE E. BAKER,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 646

MR. JUSTICE THOMSON delivered the opinion of the court.

The issues involved on this appeal are identical with those involved in case No. 25462, in which opinion has been filed this day.

For the reasons there stated, the judgment of the Municipal Court, appealed from in the case at bar, is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

Nil - 25466

OLIVER W. FITZ,
Appellee,

v.

CLARENCE W. BARKER,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 646

MR. JUSTICE THOMSON delivered the opinion of the court.

The issues involved on this appeal are identical with those involved in case No. 25462, in which opinion has been filed this day.

For the reasons there stated, the judgment of the Municipal Court, appealed from in the case at bar, is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

212 - 25467

OLIVER W. FITTS,

Appellee,

v.

JOHN E. GRATHOND,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

220 I.A. 646

MR. JUSTICE THOMSON delivered the opinion of the court.

The issues involved on this appeal are identical with those involved in case No. 25462, in which opinion has been filed this day.

For the reasons there stated, the judgment of the Municipal Court, appealed from in the case at bar, is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

264 - 25522

A. B. ALPIRN,

Appellee,

v.

MURRAY IRON WORKS COMPANY,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 646

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant corporation seeks the reversal of a judgment for the sum of $539.51, recovered by the plaintiff in the Municipal Court of Chicago. Although the bill of exceptions has been stricken from the record on plaintiff's motion, counsel for defendant on the oral argument in this court referred to the facts of the case as shown by the evidence and counsel for the plaintiff stated that he had no objection to having all the facts of the case involved, presented to this court and we shall therefore refer to them here.

It appears that the plaintiff was engaged in the scrap iron business in Omaha, Nebraska and in December 1916, he shipped a car load of scrap iron to a customer at Bittenderf, Iowa, but through some mistake of the railroad it was delivered to the defendant's yards at Burlington, Iowa. This car contained 41,500 pounds of scrap iron valued at $25.50 per ton. Before the mistake in the delivery of this car was discovered, the defendant unloaded the car and converted its

contents to its use. After the mistake was discovered, the plaintiff communicated with the defendant, stating that the price of the materials so converted was $26.50 per ton, f.o.b. Omaha but rather than have the defendant pay for the material converted, the plaintiff preferred that the defendant load a car with the same material and forward it to the original consignee. The defendant replied that it could not furnish the same material but that it would supply a car load of steel clippings, and the plaintiff accepted that proposition provided the defendant would furnish, in the material offered, one and one half times the quantity of the material converted, and the defendant advised the plaintiff that he was willing to do that if the plaintiff would accept punchings and in answer to that suggestion, the plaintiff stated that he could use punchings on the same basis as clippings. The defendant then advised the plaintiff that he had directed the shipment of a car load of punchings to the plaintiff's customer at Rittendorf. This car, however, was never shipped, the defendant explaining that the car it had intended to use had been removed by the railroad before loading. But, subsequently, the defendant did load a car with punchings to the extent of 79,100 pounds which was considerably in excess of the amount he had agreed to ship. The defendant notified the plaintiff of this and asked what he would allow on the overweight and the plaintiff offered $30 per ton for the overweight and directed the shipment of the car to his customer at Kansas City, Missouri. The defendant then advised the plaintiff that he had received a better offer for the material and had disposed of it and the defendant then suggested that the matter be adjusted by the defendant paying the plaintiff for the converted material at the price of $26.50 per ton, and in that com-

nection the defendant sent the plaintiff a check for $549.87. The plaintiff returned this check and insisted upon the defendant supplying the material which had been agreed upon in lieu of the material converted. Finally, the defendant loaded a car of punchings and pursuant to plaintiff's instructions forwarded it to a customer of the plaintiff in Hannibal, Missouri, but this car was rejected by the customer because of the fact that it contained considerable material other than punchings. This car was disposed of by the defendant elsewhere. Thereupon, the plaintiff sent the defendant a bill for $1055.76, to cover his loss on the punchings which he claimed the defendant had agreed to ship to replace the material which the defendant had converted to its use. This amount was based on a price of $35 per net ton, f.o.b. Hannibal, Missouri, which was the price the plaintiff was to receive from his customer at Hannibal. The defendant refused to make any such payment and again sent the plaintiff its check for $549.87, in payment of the material which it had used, and again the plaintiff returned the check. The defendant declined to do anything further in the way of supplying material in lieu of that which had been converted by it and thereupon the plaintiff instituted this suit.

The plaintiff filed a statement of claim, alleging that his claim was for "[illegible] pounds of punchings delivered to defendant on or about September 16, 1916, which defendant promised to replace by like material, of the same kind and quality, to Hannibal, Missouri, September 25, 1917, but refused to do, amounting to $1,089.38", with interest in the sum of $65.30. The defendant filed an affidavit of merits, setting forth that it had a good defense upon the merits to

a portion of the plaintiff's demand. In substance, the affidavit admitted the defendant's conversion of the original material valued at $549.87 and the defendant made tender of that amount to the plaintiff. Further the affidavit denied that the defendant had promised to replace 62,250 pounds of punchings by a like material or to deliver the same to Hannibal, Missouri, or that it was indebted to the laintiff in any sum in excess of the amount tendered. The affidavit further alleged that any promise to replace the material converted by punchings was without consideration and that no binding or complete contract to that effect had been made by the defendant.

In due course, on motion of the plaintiff, the court entered judgment against the defendant for $549.87, the amount admitted to be due and owing to the plaintiff, and reserved for further determination and adjudication, the matter of the balance of the plaintiff's demand and the question of costs. Thereafter the court granted the plaintiff leave to file an amended statement of claim instanter. This set up "that defendant had, on December 16, 1916, wrongfully converted to its own use certain material belonging to plaintiff, in consideration of which and other considerations defendant agreed on September 19, 1917, to deliver to Hannibal, Missouri, 62,250 pounds of steel punchings, but has wholly failed so to do," to the plaintiff's damage in the sum of $2,000. Thereupon the defendant filed a supplemental affidavit of merits, setting up the judgment which the court had entered in the plaintiff's favor for $549.87, and that such judgment had been entered upon the original statement of claim and affidavit of merits filed by the respective parties. It then alleged that this judgment was the value of the material converted by the defendant in December 1916, and "that having

recovered therefor, plaintiff cannot now have recovery for the value of the car of steel punchings which he claims was to have been delivered at Hannibal, Missouri." This supplemental affidavit of merits further set up that the judgment which had been entered for the plaintiff was res adjudicata and that by the entry of that judgment the plaintiff had elected to recover for the value of the converted material and was therefore barred from any further recovery. This supplemental affidavit of merits was stricken from the files on plaintiff's motion and after consideration of the evidence introduced, without the intervention of a jury, the court entered final judgment in favor of the plaintiff and against the defendant for the sum of $539.51 and costs, to reverse which the defendant perfected this appeal.

In the first place it seems clear, from the facts set forth above, that the defendant engaged to supply the plaintiff with a car load of punchings, amounting to approximately 88,250 pounds, in lieu of the car load of punchings which the defendant had shipped to the plaintiff's customer at Hannibal, Missouri, which car the customer rejected and that this undertaking on the part of the defendant was supported by a good and sufficient consideration, namely, the conversion of the original material shipped by the plaintiff to defendant's customer at Bettendorf, Iowa, which material, through an error, came to the possession of the defendant and was converted to its use. It is true that upon so converting that material the defendant might have fulfilled the resulting obligation that arose on the defendant's part to the plaintiff, by paying the plaintiff the value of the converted material, but the facts which we have set forth and which do not seem to be ser-

iously disputed, show that when the plaintiff requested the defendant to compensate him for the conversion in question by supplying clippings, and later punchings, in one and one-half times the amount of the material converted, the defendant not only agreed to do so but proceeded to carry out its agreement and it shipped a car of such material and when that car was rejected by the plaintiff's customer, due to the fact that it contained considerable material other than punchings, the defendant made no complaint and disposed of the car elsewhere, and then engaged to supply the plaintiff with a car of punchings in lieu of that which had been shipped and rejected by the plaintiff's customer at Hannibal.

In our opinion the contention of the defendant to the effect that in taking the first judgment for $649.87, the plaintiff had elected a recovery for the value of the converted material and that in filing his amended statement of claim the plaintiff changed the theory of his claim and sought to recover for the value of the material which he claimed the defendant had agreed to supply in lieu of the converted material, and that the judgment appealed from is a judgment based on the latter theory, is not tenable. It seems quite plain that the plaintiff's original statement of claim and his amended statement of claim were based upon the same theory, namely, a claim for the value of the material he alleged the defendant had promised to supply him, to-wit, 82,250 pounds of steel punchings. It is quite apparent that an error was committed in the filing of the plaintiff's original statement of claim. Instead of the words "delivered to defendant" the statement should have averred "which defendant agreed to deliver"

and this in substance was the correction made by the plaintiff in filing his amended statement of claim. By no possible consideration, as the defendant seems to contend, can the original statement of claim be construed as one based upon the value of the material as converted by the defendant. The material converted was scrap iron amounting to 41,810 pounds and Hannibal, Missouri was in no way involved in that conversion. On the other hand, the material which the defendant engaged to supply the plaintiff was "62,250 pounds of punchings", which is the material referred to in the original statement of claim and the defendant engaged to supply that material in order to replace the car it had sent to the plaintiff's customer at Hannibal, Missouri, which conformed to the allegation made in the original statement of claim. We hold that the theory on which plaintiff's amended statement of claim was based was one and the same with that upon which his original statement of claim was based.

Inasmuch as the affidavit of merits admitted that there was due the plaintiff from the defendant a certain amount, which was less than the total of the plaintiff's demand, it was entirely proper under the rules of the Municipal Court, based upon our statutes, (J.& A.par. 8592) to enter judgment in favor of the plaintiff for the amount admitted to be due and proceed to determine and adjudicate the balance. McKey v. Provus, 181 Ill. App. 364. The defendant's contention that the first judgment for the plaintiff was res adjudicata, is without merit. Marshall Field & Co. v. Nyman, 210 Ill. App. 214.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

25688

3K9 - 25608

MOTOR CAR DEPARTMENT OF ILLINOIS, a corporation,

Appellee,

v.

G. A. J. CARBURETOR COMPANY, a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

220 I.A. 646

MR. JUSTICE THOMSON delivered the opinion of the court.

The defendant Carburetor Company bought an automobile from the plaintiff Motor Car Company, on which it made an initial cash payment of $400. For the balance, the defendant gave the plaintiff five judgment notes, each for the sum of $429.80. The plaintiff brought this suit on two of these notes and obtained judgment by confession for $829.67. Subsequently, the court opened up the judgment and gave the defendant leave to defend, and a trial was had, resulting in a verdict for the plaintiff in the sum of $600. Following that verdict the defendant made a motion for a new trial which was allowed and when the case was again tried, the court, at the close of all the evidence, directed a verdict for the plaintiff for the amount of the original judgment, $829.67, whereupon the court ordered that the judgment rendered against the defendant by confession, stand confirmed. From that judgment the defendant has perfected this appeal.

In support of the appeal the defendant contends that

the court erred in admitting the contract in evidence without "any proof of what purports to be the buyer's signature and without any proof having been made that it was delivered to the seller." The only defense interposed by the defendant in this case, as set forth in an affidavit filed by it, sworn to by defendant's secretary, was that the automobile had been purchased by it under a guarantee by the plaintiff and that it had not proven to be as guaranteed. There is not the slightest intimation anywhere in the record that the defendant questioned its execution of the contract. It seems rather strange for the defendant to make such a contention in this court, in view of the fact that the defendant itself offered the contract in evidence and it was received without objection.

The defendant next urges that, assuming that the contract was executed by it, nevertheless "it was at best a mere proposition or offer on thepart of the buyer, with reference to buying the car." It was provided in the contract "that this contract is in no way binding upon the Reamer Motor Car Company, Incorporated, until it is signed or otherwise specifically approved by the signature of an officer of the company or its sales manager." The contract was introduced in evidence and as it appears in the record it contains no execution by the plaintiff. Under the signature of the defendant there appears the following: "Reamer Motor Car Company of Illinois, Per_____." without signature. The defendant contends that inasmuch as it executed an offer of purchase, specifying the mode of acceptance as quoted above, it could not be bound before its proposal was accepted in the

form specified. It appears from the record that in offering this contract in evidence, counsel forthe defendant said, "I am offering in evidence as defendant's Exhibit 1, contract dated April 18, 1918, for the purchase of a four passenger Romer motor car, model 6-54, signed by the D. & J. Carburetor Company and accepted by the Romer Motor Car Company of Illinois, by C. J. Kenworthy." It appears elsewhere in the record that Mr. Kenworthy was the manager of the plaintiff company. If defendant's counsel was correct in his statement about the contract he was offering in evidence, it was accepted by the plaintiff in full conformity with the mode of acceptance specified in the contract itself. After the defendant had introduced this written contract and proceeded in its attempt to establish that the plaintiff had made certain warranties in connection with the sale of the automobile and that there had been a breach of those warranties, the plaintiff objected "for the reason that the contract offered in evidence by the defendant shows that there was no warranty of any kind on this car by the plaintiff company", and that in the absence of such warranty on the part of the plaintiff, it is immaterial whether there were any defects in the car or not. In connection with this objection, counsel for the defendant did not contend nor even intimate that his position was that there was no written contract between the parties by reason of the failure of the plaintiff to execute its acceptance of the written proposal which the defendant had signed and that, therefore, it was proper to introduce evidence to the effect that the plaintiff had made warranties in connection with the sale of the car. The conduct of the case in the trial court was entirely on the theory that the plaintiff had executed its acceptance of the written proposal and that being the situation, the defendant

cannot present the case here on any different theory. We note that counsel for plaintiff allege in their brief that the written proposal was accepted by the plaintiff in writing in the form stated by counsel for the defendant when the instrument was introduced in evidence by the latter and that this was shown by the original exhibit but that through some error the copy used in making up the record did not contain Mr. Sawyerip's name and this is not denied by counsel for the defendant in their reply brief. While this cannot change the record as we find it, we mention it in connection with our holding that, the case having been mandated by the defendant in the trial court without any contention there in any way that the acceptance had not been duly executed by the plaintiff, this appeal cannot be presented by the defendant in this court on the theory that the acceptance had not been executed.

The proposal or contract in question contained the following: "It is understood that this car is sold under the warranty of the Barley Motor Car Company, a copy of which will be found on the back of this contract, and that all claims arising by reason of such warranty shall be made against the Barley Motor Car Company * * * It is mutually agreed that there are no promises, understandings or agreements, verbal or written, of any kind, pertaining to this order, not clearly specified in it." Immediately under the name of "Roamer Motor Car Company of Illinois, Per_____" appears the following: "Your attention is called to the warranty on the back of this contract". On the reverse side of the contract appears the "Manufacturer's Warranty", covering ninety days and limited to shipment to the purchaser of such parts as shall, under normal use and service, appear to the manufacturer to have been defective

in material or workmanship. In connection with its defense, the defendant offered to prove that after receipt of the car, certain parts of it "fell off" and broke, from time to time, and that other parts would not work and that on several occasions it was returned to the plaintiff's repair shop where certain repairs were made but that the unsatisfactory condition of the car continued. Objection to the evidence as thus offered was made and sustained. The defendant further offered to show that at the time of the purchase of the car from the plaintiff, certain representations were made to the defendant as to the condition of the car, in addition to or other than the ones set forth in the written proposal or contract, to which objection was also made and sustained. In our opinion, these rulings of the court were correct. The evidence as then offered was incompetent as it tended to vary the terms of the written contract which had become binding upon both the parties. Even if the warranty in question were that of the plaintiff instead of the manufacturer, it would be necessary to hold that the offer of evidence made was insufficient. It was neither shown nor did the defendant offer to prove that parts had become defective and that their replacement had been refused.

Finally the defendant contends that the judgment for the plaintiff should be reversed because the last time the car was returned to the plaintiff's repair shop, the plaintiff "took back the machine and kept it and never returned it to the defendant and refused to return it to the defendant." We have carefully examined the record for a substantiation of that statement but have been able to find none, either in the form of proof or offer of proof.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

25658

397 - 25658

MUTUAL CONSTRUCTION COMPANY,
a corporation,

Appellee,

v.

MEIN FURNITURE COMPANY,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 647

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Construction Company sued the defendant Furniture Company to recover the balance alleged to be due on a written contract, under which the Construction Company agreed to provide all the materials and perform all the work required for the alteration of a certain barn for the Furniture Company, for the sum of $1950. It was stipulated by the parties that the contract had been executed as alleged, the work had been performed by the plaintiff in accordance with the contract and the plaintiff had been paid $525.00 on account of the contract price and that the amount specified in the statement of claim, $634.36, was the unpaid balance due the plaintiff, and that the only issue to be decided was "whether or not the said contract was ultra vires as to the defendant company, and therefore of such a character that plaintiff cannot collect from the defendant."

The issues were submitted to the court without a jury and after hearing the evidence the court made a finding for the plaintiff and entered judgment against the defendant

for the full amount of the claim.

One Wiechelt testified that he was the secretary and treasurer of the plaintiff company. That at the time the contract in question was executed he had a talk with one Braverman, who was the president of the defendant company and who had signed the contract in question in that capacity; that at this conversation there was also present a Mr. Blumenthal, one of the officers of the defendant company, and that Braverman told the witness that they wished to remodel this barn into a garage where they could store their furniture truck and their furniture; that they had furniture stored in a lean-to next to the barn where it might easily be stolen and they wanted to get it into a safe place, to do which it was necessary to remodel the barn, and that since there were a few rooms on the second floor of the barn, they would remodel them so that one of their employees could live up there. Wiechelt further testified that during the progress of the work he had several conversations with Braverman, in which the latter planned where he was to put the truck and store his furniture and he made provision for an extra door, so that if they wanted an extra truck they could put them both in there. He further testified that on two or three occasions he saw a Ford Truck at the barn loaded with furniture and that the truck had the words "Erie Furniture Company" painted on the side. He also testified that the check for $525.00 in part payment for the work, had been secured by him at the office of the Erie Furniture Company and that it had been made out by Mr. Braverman and Mr. Blumenthal but he did not remember whose name was signed to it; that he rendered a final statement, showing $581 still due and that they "offered to pay" $535, which was refused.

On cross-examination, the witness stated that both Braverman and Blumenthal told him that the truck referred to belonged to the defendant company and that he saw it at the barn every morning if he got there before eight o'clock at which time they took the truck out. He further testified that these men did not tell him that the furniture to be stored was furniture they took from people for storage purposes but said it was their own.

The president of the plaintiff company, one Warren, stated that a man whose name he did not know but whom he identified in the court room as Blumenthal, told him at the time this job was started, that they wanted to get a solid floor put in as he was going to put two trunks in there and some furniture and that he wanted the place right away; that he took the witness outside, where he had a lot of furniture in a lean-to, and said he wanted to get that furniture inside as the rain was getting at it; that Blumenthal said "This furniture belongs to us"; that he (the witness) saw a Ford truck around there, which brought several loads of furniture into the place while he was there; that some furniture was taken away and some was brought in.

For defendant, Blumenthal testified that the barn in question was owned by Braverman and himself. The court asked him if any truck had ever been kept or stored on the premises and he answered, "We have no truck, your Honor." He was then asked whether there was any furniture there and he answered, "No, not belonging to the Erie Furniture Company". He further testified that the Emil Kahn Company occupied the barn and flat above when this remodeling work was done and

that they rented the premises from Braverman and himself. This witness identified the charter of the defendant company which was introduced in evidence, from which it appears that the object for which the defendant company was formed "is for manufacturing, making, repairing, buying and selling all kinds of household and office goods and furniture, and to engage in the conduct a general wholesale and retail furniture business; also to issue stock which shall be preferred as to dividends and participation in the distribution of assets, and to do all things necessary and incident to the full exercise and enjoyment of the above objects.". He further testified that nothing had been paid on this contract, on account, by the Erie Furniture Company but that the payment had been made by Braverman and himself. He denied the conversations testified to by Wiechelt and Warren. On cross-examination, Blumenthal testified that the barn was being remodeled for the purpose of being rented as an income proposition. The witness was asked when it had first occurred to him that the Erie Furniture Company might set up as a defense that this contract was outside of its authority. Defendant's counsel objected to this question saying that the defense was a legal one which they had a right to make, but the court overruled the objection and the witness replied, "At the time the contract was signed, before any work was done." The court asked the witness who the original stockholders of the defendant company were and he replied that they were Mr. Braverman, a Mr. Hameson and himself. He was then asked how much stock Hameson had taken when the corporation was formed and he answered, "One share, it requires three to form a corporation." The court then asked, "You just retained a one-half

interest?" and the witness replied, "No, I have it all now." Later he testified that he and Braverman had organized the defendant company and the court asked, "Who owns it now?" and he replied "R. Blumenthal owns one share." He was asked who that was and he said it was his wife.

It is quite apparent from this statement of the evidence that it fails to present any question of ultra vires, if the witnesses for the plaintiff are to be believed. We assume that the trial court believed the testimony of these witnesses and we are unable to say, from the record, that the finding based on that belief was against the manifest weight of the evidence. Of course, if this barn was being remodeled so as to furnish a place in which the defendant could keep its truck and a place for its use as a storage room for its furniture, with the rooms upstairs as living quarters for one of its employees, the latter being apparently incidental to the former, it cannot be said that the facts involved any question of ultra vires. There is not the slightest foundation in the record for any contention that in fixing up the rooms on the second floor of the barn the defendant was preparing the building in which to conduct a boarding house, as was the case in U. S. Brewing Co. v. Dolere & Shepard Co., 289 Ill. 574. The case at bar was simply the case of a furniture company remodeling a barn so that it might be used by it as a garage in connection with its business and as a storage place for its furniture and incidentally it fixed up some rooms where one of its employees could stay, presumably for the purpose of protecting its property.

We confess to the suspicion that the attitude of the defendant in this case is a pure subterfuge, as it appears

that Blumenthal, the only witness for the defendant, who claims that the contract was not for the benefit of the company but for the benefit of himself and Braverman, was, together with Braverman and his (Blumenthal's) wife, the owner of all the stock of the defendant company.

In our opinion it is clear that this appeal has been prosecuted for delay and therefore, under the authority of the statute (Ill. Sts. J.& A., par. 2737) it is the order of this court that the appellant pay the appellee a sum equal to ten (10%) percentum on the amount of the judgment sought to be reversed.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed, with damages as indicated.

AFFIRMED WITH DAMAGES.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

1527a

430 - 25691

MARK FALLON,
Appellee,

v.

CITY OF CHICAGO,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

220 I.A. 647

MR. JUSTICE THOMSON delivered the opinion of the court.

In this action the plaintiff sought to recover damages alleged to have been suffered by him by reason of personal injuries brought about by the negligence of the defendant. This is the second time the case has been in this court. On the first trial the court held that there was a variance between the declaration and the proof and allowed the defendant's motion to strike out the evidence on that ground. Plaintiff was then given leave to file an additional count instanter and upon his doing so, the defendant pleaded the general issue to the additional count and also filed a special plea, setting up the statute of limitations. The plaintiff demurred to that special plea and the demurrer was overruled, whereupon the defendant moved the court for a directed verdict, which motion was allowed, and judgment was entered accordingly. Plaintiff then sued out a writ of error and in 212 Ill. App. 655, we held that the trial court erred in allowing the motion to strike out the evidence on the ground of a variance, and also that the additional count filed by the plaintiff had not set up a new cause of action

and that therefore the plea of the statute of limitations to that count, should have been held bad on demurrer. The judgment of the trial court was reversed and the cause remanded.

Upon the re-trial of the case the jury found the issues for the plaintiff and assessed his damages at the sum of $6,000. Upon the motion for a new trial the plaintiff entered a remittitur of $2,000 and the court then overruled the motion and entered judgment against the defendant for $4,000 to reverse which the defendant has perfected this appeal.

The only contention made by the defendant in support of the appeal is that the judgment is contrary to the law, in that if plaintiff's injuries were the result of negligence, it was the negligence of a fellow servant, for which the defendant could not be held liable. The plaintiff was a laborer in the Water Pipe Extension Department and at the time of his injury had been working for six or seven weeks, in a gang which was engaged in laying a large water main in one of the streets of the City. In the laying of this pipe a derrick was used for the purpose of lowering the pipe into the ditch. This derrick consisted of three legs, two of them, connected by means of a cross piece, being located on one side of the ditch and the other leg on the other side of the ditch. The three legs were joined together at the top, where there was a block and tackle rig. As the pipe was laid, the derrick would be moved along by the men, over each section of the pipe as it was ready to be lowered into place. It appears from the evidence that the single leg of the derrick was embedded in the dirt on one side of the ditch and on the other side, the two legs of the derrick were blocked up by means of certain

pieces of wood.

The width of the ditch in which the water pipe was being laid was about six feet. Upon the occasion in question a point had been reached where it was necessary to put in a shut-off valve, which apparently weighed two tons or more. At this point the ditch was dug out to the width of nine or ten feet and it appears from the evidence that the derrick was placed in position in the manner above described, over the place which was to be occupied by the valve. Two heavy wooden skids were then placed across the ditch and the valve was moved onto these skids and over the center of the ditch, whereupon the tackle, operated in connection with the derrick, was attached to the valve so that it might be raised up and the skids removed and the valve lowered into place.

It further appears from the evidence that the skids were not placed across the ditch at the point occupied by the derrick and over the point where the valve was to be lowered into place but they were so placed that when the valve rested upon them, it was about ten feet to one side of the center of the derrick. On the day in question, this gang of men was somewhat short handed and the plaintiff testified that when the valve was to be raised, he was directed by the foreman to go to the wheel by means of which the drum of the derrick was turned, thus raising or lowering the object that the derrick was operating upon. There were two such wheels on this drum,- one at each end of the drum. The plaintiff did as directed by his foreman and assisted at one of these wheels. When the wheels were turned so that the weight of the valve left the skids and was taken by the derrick, the derrick collapsed and as it came down,

the plaintiff fell under it and thus sustained the injuries complained of. The plaintiff testified that he did not know, of his own knowledge, what caused the derrick to come down. In describing the accident, one of the plaintiff's fellow workmen testified "We are just raising the valve up, got up a little ways, when something give, and the derrick spread." This witness also testified that the derrick spread on the side where the two legs were; that the legs went over the blocks; that the blocks and legs went together. The plaintiff testified that he had never been required to man the derrick wheel before this occasion; that his work was that of a common laborer, moving the pipes and helping to shift the derrick along the ditch,- carry the blocks and so on; that it was never a part of this work to place the blocks under the derrick; that he usually assisted in moving the third leg which it appears from the evidence was never blocked up. He further testified that this was the first gate valve they had put in, during his period of service on that job. One of the other witnesses testified that he was "pretty sure" they had put in another valve before this.

There is no doubt, from the evidence, that this derrick, on the occasion in question had been blocked up by workmen who were fellow servants of the plaintiff but we cannot say that the evidence establishes the fact that the spreading of the derrick was due to any negligence on their part, or was caused by the manner in which they had done their work. It would seem rather, from the evidence, that the spreading of the derrick was due to the negligence of the foreman on the job who permitted or directed the men under him to use the derrick in the manner indicated and for the

purpose of lowering this valve under the conditions described. While this derrick seems to have been suitable for use over a ditch only six feet wide and to support the weight of a length of 48 inch, iron pipe, it turned out to be quite the contrary when placed over a nine or ten foot ditch and called upon to carry the weight of a valve weighing several tons, especially when that weight, as it was brought to bear on the derrick, was not directly under the center of the derrick but ten feet to one side of it. Neither the plaintiff nor his fellow servants had anything to do with the manner of placing or locating the derrick or the valve, all of which was done under the direction of the foreman and as we view the evidence, this accident was due to his negligence in directing that the work be done in the way we have described it. There is no evidence showing that it was caused by any negligence on the part of the plaintiff's fellow workmen in blocking up the side of the derrick where the two legs were located, which blocking appears to have been done on this occasion in the same manner which had always been followed in using the derrick.

For the reasons stated the judgment of the Superior Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

479 - 25748

CITY OF CHICAGO,
Appellee,

v.

CHARLES F. GLINK,
Appellant.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

220 I.A. 647

MR. JUSTICE THOMSON delivered the opinion of the court.

A complaint was filed in the Municipal Court of Chicago, charging the defendant with operating an automobile upon and along the public streets of the City of Chicago, while in an intoxicated condition, in violation of the city ordinances. A jury was waived and the case was tried before the court. The defendant was found guilty and judgment was duly entered, imposing a fine of $100, to reverse which the defendant has perfected this appeal.

The only matter presented in this court in support of the appeal is the contention that the finding of guilty is against the manifest weight of the evidence. The evidence presented in behalf of the city, if believed by the court, was sufficient to warrant the finding, although the defendant himself gave testimony contradicting that offered in behalf of the city, and in some measure he was corroborated by those who testified in his behalf.

The complaining witness was driving a newspaper wagon

on one of the streets of the City of Chicago about four o'clock in the morning. He was driving in the street car tracks and stopped his horse and wagon in the track opposite a store at which he was to make delivery of a bundle of papers. After leaving the papers at the store he returned to his wagon and got on a step, attached to the rear of the wagon and from which he was in the habit of driving the horse. He testified that although it was dark, the atmosphere was clear and that he looked about before getting on the step but saw no vehicle approaching and that after his horse had proceeded a few feet, he was struck from behind by an automobile driven by the defendant. He testified further that the collision damaged the automobile some and broke the step on which he was riding and that he hung on to the wagon for a moment and then became somewhat faint, lost his hold and fell to the street. The automobile had come to a stop and the complaining witness testified that while he was lying or sitting in the street he called to the defendant to come and help pick him up and get him to a hospital; that it seemed ten minutes to him before the defendant drove his car along side of the witness and that the defendant leaned over and made an attempt to pick him up but stumbled over him and could not help him; that at this time he detected the odor of liquor on the defendant's breath. He further testified that he was finally able, by his own efforts, to get on the side step of the automobile and lie on the running board, hanging on to one of the doors, while the defendant got into the car and drove slowly down the street toward the hospital, which appears from the record to have been located not very far away. On the way to the hospital they met a police officer returning with the

horse and wagon, the horse having run away when the collision occurred. The officer turned in behind the automobile and followed it to the hospital. The officer testified that when they got there the complaining witness told him his legs were broken; that the defendant was going to help him "but he was making such a poor out I knelt down and told the boy to catch me on my back and I took him on the back and carried him into the hospital". He further testified that the defendant accompanied them into the hospital and that after they were inside, the defendant got into an argument with the complaining witness over the occurrence and that he reminded the defendant that he was in a hospital where there were many sick people and that it was four o'clock in the morning and he had better keep quiet and that he said to the defendent "You have had quite a bit of liquor this morning, you keep quiet." He testified further that the reason he said that was because he smelled liquor on the defendant's breath and he could see that he had been drinking by reason of his actions and his talk; that he did not talk clearly and "he walked staggering. He was not in any condition to help me with the boy so I took the boy myself."

The defendant was a chauffeur for the Emery Motor Company and was driving one of their cabs at the time of the accident. He testified as to his trips about the city during that night and said that he had stopped in a saloon about midnight, where he had eaten a sandwich and that he had taken a bottle of beer with his sandwich. He had been in the company of two or three other chauffeurs some time after mid-night, during the time when they had not been occupied and were waiting for further orders from their garage. These chauffeurs testi-

fied to one or two occurrences during the night, when they and the defendant had gone into a "soft drink parlor" and had some near beer or "Bevo". The defendant testified that he was not intoxicated and the chauffeurs who testified in his behalf said that he was absolutely sober.

The trial court saw these witnesses and heard them testify and was in a much better position to judge of their credibility than we are. In view of the testimony as we have outlined it, we are unable to say that the trial court was not justified in finding the defendant guilty and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

15292

303 - 30654

ALLEGRETTI LEWIS,
appellee,

vs.

CHICAGO RAILWAYS COMPANY
et al.,
appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

220 I.A. 647

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

While plaintiff (appellee), who was a passenger on one of appellants' cars, was alighting therefrom at night she fell and sustained injuries which she charges were the result of defendants' negligence in starting up the car after it had been stopped to let her off and before she had alighted.

The evidence offered by each side tended to support its claim. Defendants' contention was that plaintiff remained in her seat until after the car stopped and that she made a delayed start for the rear platform, reaching it after the conductor had given the signal to start the car, and after he had gone inside of it to get some transfers, and that while he was searching for the same, plaintiff, without his knowledge and unobserved by him, passed behind him to the platform and either stepped off in the darkness, not knowing the car was moving, or was shaken off while standing at the edge of the step. The testimony in plaintiff's behalf was to the effect that the conductor was on the rear platform when plaintiff reached it, and that he gave the signal to start just as she was attempting to alight therefrom. The conflicting evidence presented questions of fact peculiarly for a jury to determine, and we cannot say therefrom that the jury were not warranted in accepting plaintiff's version

of the facts. It appears that no other person got on when the car stopped and that plaintiff was the only person who attempted to get off. If the version of the facts given by plaintiff's witnesses be accepted then the conductor, by the exercise of due care, caution and diligence, should have known whether she was attempting to alight, and hence under such circumstances it was negligence for him to start the car. (No. Chicago Street R. R. Co. v. Cook, 145 Ill. 551; Springfield Ry. Co. v. Hoeffner, 175 id. 634.) We are not prepared to say that the verdict was against the preponderance of the evidence.

The declaration charges that while plaintiff was in the act of alighting defendants negligently run the car, and through such negligence it moved forward "suddenly, violently and at a rapid rate of speed" whereby she was thrown off. It is urged that the evidence does not support the averment as qualified by the words "suddenly", "violently", etc. The evidence on that subject was, to be sure, meager, but there was evidence that "the car started with a jerk", and from such evidence it might be said it started "suddenly". But the principal element of negligence charged was the starting of the car while plaintiff was in the act of alighting, without giving her reasonable time in which to safely alight, the manner of the starting being a mere incident to such negligence. With respect to a similar declaration it was said in B. & O. S. W. Ry. Co. v. Slusher, 77 Ill. App. 207, that the case did not depend on whether such incident, as a wholly independent circumstance, was of itself an act of negligence. The same may be said here. But in any event, we think proof that the car jerked as it went forward was sufficient to sustain such

evidence.

Nor do we find reversible error in the given instructions complained of. One of them told the jury that in determining the questions of fact they should be governed solely by the evidence, and added that they had no right to indulge in conjectures or speculations not supported by the evidence. While the purpose of the instruction was evidently to inform the jury that they should not go outside of the matters in evidence in determining facts, yet it was defective in not adding that in determining the facts from the evidence they should do so under the guidance of the court's instructions, but they were practically so told in another instruction. Taking the instructions together, as the jury is presumed to have done, we do not think that they were misled into believing they could determine the facts without such guidance. (C. C. Ry. Co. v. Hoole, 206 Ill. 174.)

Instruction No. 11, relating to the assessment of damages, is also complained of. This instruction has been passed on and upheld by the Supreme Court in substantially the same form in many cases, and the differentiation of the facts in this case from those of the cases in which such instruction was approved, is not such as to warrant holding it was error to give it in the present case. We have also considered the other instructions complained of and without going into an analysis of them will say that we do not think they contain reversible error.

But we think defendants' complaint of the excessiveness of the damages is warranted. The evidence discloses that when, the next morning after the accident, a doctor was called to attend upon the plaintiff he found nothing but bruises over her body, no broken bones, no injury to her spine, and nothing that

called any particular attention to her heart beyond what might be expected of a person of her age, she then being over sixty years old. He did not deem it necessary to do more than prescribe some sedatives and hot applications, or to call on her more than three times. She received no other medical care in consequence of the injuries received. She complained at the trial, however, of trouble with her heart, soreness or pains in her back, and stated that she had done no work since the accident except to peel potatoes and wash dishes, and that prior to the accident she was able to do her own housework. But there was nothing in the evidence which tended to show that these things were the direct result of the accident. For the purpose of connecting her condition with the accident she was examined by a physician, who was called by her as a witness. He found her suffering from many disorders, an enlarged heart, rapid pulse, dropsy, prolapsus of the womb, general weakness and feebleness, and other conditions, but testified that in his opinion none of these conditions would, or could, be produced by the accident. It would seem, therefore, that most of the soreness and the pain and the disabilities plaintiff suffered at the time of the trial and for months prior thereto must have been attributable to the severe disorders found to exist by her doctor, which, from their progressive nature, must have existed for a considerable time. We think, therefore, that the verdict for $3000 was excessive. If, however, plaintiff will within ten days remit $1500 therefrom, the judgment will be affirmed, otherwise it will be reversed and the cause remanded for a new trial.

AFFIRMED ON REMITTITUR OF $1500.

Gridley and Hatchett, JJ., concur.

409 - 25670

1530

JULIUS ROHR,
Appellee,

vs.

CHICAGO CITY RY. COMPANY
et al.,

On Appeal of INDEPENDENT
BREWING ASSOCIATION, a Corp.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

20 I.A. 847

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

This case was tried without a jury, and the court found the appellant, Independent Brewing Association, guilty of negligence whereby plaintiff's horse and wagon were injured, and assessed plaintiff's damages at $100.

The evidence tends to show the following state of facts: Appellee's horse stood facing north, hitched to a wagon alongside of the east curb of a north and south street. Just before the accident referred to herein a street car was coming from the south and appellant's truck from the north. The latter crossed southeastwardly from the west side of the street in front of the street car to the east curb, a few feet in front of the horse, which then jumped or swung away from the curb so as to be struck by the passing street car and shoved together with the wagon into a collision with the truck.

While there is the usual controversy over distances and the superior opportunities of one set of witnesses over another in knowing the real state of facts, we cannot say that the court's finding and judgment were manifestly against the weight of the evidence, as we are requested to do. We think it quite obvious from the evidence that it was the movement

of the truck in the unusual and wrong way to the east side of the street towards and near the horse, thus frightening him, that was the proximate cause of the injury.

Appellant urges that appellee was guilty of contributory negligence by violating a city ordinance forbidding leaving a horse in a public street "without securely fastening him." The evidence tended to show that the horse was fastened by a strap to which a weight was attached, and that the sudden jumping of the horse caused the strap to be torn off. The evidence on the subject is not such that we can say that the means of fastening the horse would not be ordinarily secure, within the meaning of the ordinance, which hardly contemplates an extreme situation like the struggling of a horse from unusual fright.

Appellant claims that the proof of damages was inadequate. The horse and wagon were both damaged. The former was laid up for a few days from a cut received, and the latter was sent to a shop for repairs. Plaintiff had to pay for the use of another horse for six days, $12, and for another wagon for nearly two months, $1.50 a day. He also paid out $155.95 for repairs on the wagon. These repairs were shown to be "fair and reasonable." While the proof of damages was not skillfully presented and was subject to technical objections, we find no objections in the abstract which suggested more specific proof as to technical requirements, and hence we think appellant is hardly in a position to insist upon mere technical defects raised here for the first time.

Because plaintiff testified that the wagon was a second-hand wagon when bought and he paid $65 for it five years before, it is urged that under the rule of damages which

does not permit recovery in excess of the actual value of the article damaged at the time of the accident the damages are clearly excessive. Without further development of material facts bearing on the question of value we cannot infer from such evidence what was the actual value of the wagon either when plaintiff bought it or at the time it was injured. For aught that appears to the contrary, plaintiff may have paid much less than the wagon was worth, and also, in the meantime, have added to its value. We find no justification in disturbing the judgment.

AFFIRMED.

Gridley and Hatchett, JJ., concur.

15314

25,995

434 - [illegible]

[illegible],

appellee,

vs.

[illegible] COMPANY OF CHICAGO,

appellant.

APPEAL FROM
[illegible] COURT,
COOK COUNTY.

220 I.A. 648

MR. PRESIDING JUSTICE [illegible]
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of appellee, plaintiff below, against appellant-defendant, for personal injuries received from being jostled against a hoisting device or elevator, which defendant was operating to lower articles of merchandise to its basement through an opening in a public sidewalk. The opening was near the curb and closed when the device was not in use. When the elevator was in place for lowering its platform was level with the walk and its framework extended about three and one-half to four feet above it. Near the top of the frame was a pulley wheel over which ran a cable. While appellant was standing about ten feet away from the frame, watching with others the operation of the device, he was jostled by a passing stranger hurrying for a street car, causing him to lose his balance, and so he reached out his hand to recover himself it came in contact with the steel and cable, resulting in the injury complained of.

The cause of the action, as submitted to the jury, rested on one count only charging that "defendant had negligently caused, suffered and permitted said machinery and said shaft to be and remain open, exposed, unprotected and unguarded, by means whereof persons rightfully on said sidewalk were endangered;" that the child exercised ordinary care, etc., and that by

person of said negligence his head became caught in said wheel, etc.

Nowhere in the count is it charged that defendant did not exercise ordinary and reasonable care in operating the machine so as not to injure persons rightfully on the sidewalk. Nor was there proof of any specific failure in that regard either by not warning those happening to be near the device when in operation, or otherwise. In other words, the gist of the action is that it was negligence per se to operate such a device in such a place without its being guarded in some way. No facts were pleaded that raised a legal duty to erect a guard about it, such as exists under the statute requiring the guarding of dangerous machinery against accidents to employes, nor does the evidence tend to establish that it was negligence per se to operate the device in question without the erection of a guard about it. It stood near the outer edge of the sidewalk leaving several feet of space between it and the inside line of the walk for pedestrians, and from photographs in evidence of the device as then located it would not appear that persons in the exercise of ordinary care for their own safety in using the sidewalk would be endangered by it. There was no evidence as to the amount of travel on the walk, or the extent of its use, or evidence of any other character that would reasonably support the inference that such an accident was likely to happen without regard to any other precautions that might be taken other than the erection of a guard. So far as appears from the evidence the defendant may have resorted to other means to keep persons away from the device when in use by due warning or otherwise. Evidence on that subject, however, would have gone to the question of the exercise of ordinary and reasonable care on the part of defendant, the want of which, as before stated, is not the

cause of action, and was not proven. Appellee's counsel, however, seems to regard such element as in the case when he says in his brief, "In any event it was for the jury to say whether ordinary care was exercised under all the circumstances." But it is not for the jury so to say if that was not made an issue in the case. It cannot be said that defendant was guilty of failure to exercise ordinary care merely because it did not erect a guard or barrier about the machine, if it might otherwise have exercised ordinary care to keep persons near it from being injured, nor can it be said that it was negligence per se not to erect some such barrier or guard. Applicable to this state of facts is the language used in Hutchinson v. Fisher, 77 Ill. 143, in an action brought on a similar theory of liability, where the court said:

> "There is nothing shown in this case from which it appears that appellants were under any legal duty to place guards * * There is no such statutory requirement, nor are we aware of any common law rule which imposes such a duty on appellants."

Furthermore, we think the charge of negligence was not the proximate cause of the injury. The boy was in no danger of being hurt, standing where he was, if he had not been pushed or jostled against the device by a third party not under the control of defendant and for whose actions it was in no way responsible. The negligence of defendant, if any, "produced a condition which made the injury possible, but the injury would not have occurred but for the independent act" of such third party. (Smith v. Commonwealth Electric Co., 241 Ill. 452.) We think there should have been a directed verdict not only because of the insufficiency of the evidence to sustain the negligence pleaded, but because the negligence charged was not the proximate cause of the injury. Accordingly the judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley and Matchett, JJ., concur.

434 - 26595

VERDICT OF FACT.

We find that appellant, Polish Publishing Company of Chicago, Illinois, a corporation, was not guilty of negligence in permitting the machinery and shock in question to be and remain open, exposed, unprotected and unguarded, as alleged in the declaration, and that the negligence charged in the declaration was not the proximate cause of the injury complained of, but that such injury was caused by an intervening, independent act of a third party, namely, the pushing or jostling of appellee against the machine in question.

1532a

474 - 25736

JOHN M. McKEY,
Appellant,

vs.

LOUISE TUCKOLOR,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 648

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit begun by an attachment, upon the claim that plaintiff had fraudulently conveyed her property, etc., within two years prior thereto. Issue was taken on the attachment and claim of indebtedness. Plaintiff was ruled to file a bill of particulars, which as filed, limited proof to his claim for a commission for the sale of a certain building. On defendant's motion at the close of plaintiff's case a verdict was directed for defendant. No attempt was made to sustain the attachment. To support the claim for a commission plaintiff introduced in evidence a contract whereby defendant on January 7, 1910, gave plaintiff an exclusive right to sell her property for a period to May 1, 1910, also a contract of defendant on April 3, 1910, to sell the property to another party, and notification by defendant on April 4, 1910, of her cancellation of plaintiff's contract.

To establish the claim for a commission it was necessary to show that plaintiff was the procuring cause of the sale. The evidence was to the contrary. But appellant claims error in that the court did not receive in evidence a conversation had between the purchaser and a witness for plaintiff before she bought the property.

Appellant's counsel offered to prove that the witness told the purchaser that plaintiff had the property for sale, but that she went over to another real estate agent. The offer was not sufficiently broad to connect plaintiff as the procuring cause of the sale, and therefore was properly rejected. In support of the claim of its materiality appellant's counsel argues that the witness had seen an advertisement of the sale of the property by appellant and by reason thereof brought it to the purchaser's attention in that conversation. But this state of facts was not disclosed in the offer, and had it been, inasmuch as the witness afterwards testified that he had never seen the advertisement before the time of the trial, it is apparent plaintiff could not have sustained his offer.

Whether or not defendant was guilty of a breach of contract, it was not made an issue in the case, and as plaintiff failed to prove his alleged cause of action, that he was the procuring cause of the sale, the judgment will be affirmed.

AFFIRMED.

Gridley and Hatchett, JJ., concur.

1533a

S19 - 25780

JAMES D. CARTER,
Appellee,

vs.

ANTHONY BLAKELY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

220 I.A. 648

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit for forcible detainer based on a five days notice, alleging rent to have been due under a lease, the terms of which do not appear in the evidence. The action was brought January 21, 1919, for the non-payment of rent for the month of December, 1918, and tried April 4, 1919. Plaintiff admitted that the rent was paid up to the month of December, 1918, and that in February, 1919, while the case was still pending three more months rent was paid. The receipts issued therefor did not state for what months, but as at that time less than three months had passed since rent was fully paid, and presumably, in the absence of any evidence as to the terms of the lease, the rent so paid covered the intervening months of December, January and February. Plaintiff's agent testified that on February 4, two months rent was paid by defendant's lawyer upon an agreement that it was "not to cover any particular two months," and that plaintiff would "hold the month of December open for rent due thereon under said five days' notice." But he further testified that on February 28th, defendant paid another month's rent, and presumably that payment was for the month of December. In any event, plaintiff by accepting rent for a period subsequent to the breach on which the action was predicated recognized

defendant's right to possession and waived his right to declare a forfeiture for the December rent. (Hopkins v. Levandowski, 250 Ill. 372, 375; Bradle v. Garner, 140 Ill. 123; Krygsman v. Stamatakos, 175 Ill. App. 583.) In the last cited case it was said "the acceptance of rent by the landlord, * * * for a period of time after a breach of such stipulation has occurred and with knowledge of such breach is a waiver by him of his right to declare a forfeiture therefor." (p.586) It is difficult to determine upon what theory the court directed a verdict for plaintiff, when as the evidence did not sustain plaintiff's cause of action it should have been directed for the defendant.

Accordingly the judgment will be reversed.

REVERSED.

Gridley and Matchett, JJ., concur.

Testimony denied

1537

354 - 26598

FRED W. HOLM,
Appellee,

vs.

COUNTY OF COOK et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

220 I.A. 648

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee moves to strike from the transcript of the record the alleged bill of exceptions, and to affirm the judgment.

The facts of record, upon which the motion is predicated, are as follows: The sixty days' time allowed by order of court in which to file the bill of exceptions expired June 9, 1930. On that date appellants presented their bill of exceptions to a judge other than the trial judge in the case, who endorsed thereon: "Presented and filed this 9th day of June, 1930, in the absence of Thos. G. Windes, who is not holding court in this county on this day. (Signed) Frank Johnston, Jr. Judge of the Circuit Court of Cook County, Illinois." The next day the said bill of exceptions was presented to Judge Windes, who was the trial judge, and he marked beneath Judge Johnston's endorsement, "Presented and filed this 10th day of June. Thos. G. Windes, Judge," etc. Both of these endorsements are below the usual formal concluding part of the bill of exceptions, which was not signed.

Appellants urge that said signature of Judge Windes together with his endorsement is sufficient to indicate that he passed on and accepted the bill of exceptions, as it was

ordered to be filed. But even if that contention is tenable, presentation of the bill of exceptions to the trial judge for that purpose after the time allowed therefor, was of no avail, and did not become so through presenting the same on the prior day to Judge Johnston. Referring to People v. Rosenwald, 306 Ill. 548, the Supreme Court in City of East St. Louis v. Vogel, 276 id. 490, said:

> "There is no authority for presenting the bill of exceptions for settlement to a judge who did not try the case, and there was no presentation to any judge who was authorized to settle the bill of exceptions within the time fixed for that purpose."

In the Rosenwald case, as in the case at bar, the bill of exceptions was first presented to another than the trial judge and not to the trial judge until after the expiration of the time allowed therefor. The court there said that the judge to whom the bill of exceptions was first presented could undoubtedly have entered an order (as could Judge Johnston in the instant case) extending the time within which the bill of exceptions might be signed by the trial judge.

Assuming that a showing of diligence is material, yet we cannot agree with appellants that due diligence in seeking to have the bill presented to the trial judge before it was presented to the other judge may be inferred from the recitation in the entry endorsed on the bill of exceptions by Judge Johnston that the trial judge was not holding court that day. However, from what was said in the Rosenwald and Vogel cases, the fact that the trial judge was not holding court that day furnished no reason for presenting the bill of exceptions to another judge. We find no justification, either in the statute or the decisions of the Supreme Court on the subject, for recognizing as a part of the record in this case the document called the bill of exceptions. Nor do we think appellee is precluded from urging

his motion because of the stipulation between counsel that the original stenographic report of the trial might be incorporated in the record instead of a copy thereof.

No assignments of error relate to the common law record, except such as were, or should have been, fully presented on the former appeal in this case, reported in 213 Ill. App. 1, and which are to the effect that the declaration cannot support the verdict because it is "vague and indefinite", "uncertain and double". The declaration was impliedly held to be sufficient on said appeal and the cause was remanded for trial thereon, and defendants pleaded to it. It is not, therefore, subject to such objection at this time. Accordingly the motion will be granted, and the document referred to as the bill of exceptions will be stricken from the transcript of the record, and the judgment will be affirmed.

AFFIRMED.

Gridley and Matchett, JJ., concur.

SBO - 88640

JOHN J. FLANIGAN,
Appellee,

v.

HENRY M. ASHTON,
Appellant.

APPEAL FROM
CIRCUIT COURT
OF COOK COUNTY.

220 I.A. 648

MR. JUSTICE SMILEY delivered the opinion of the court.

This is an appeal by Henry M. Ashton from an order of the Circuit Court of Cook County, entered March 17, 1918, awarding a writ of assistance in favor of John J. Flanigan, the purchaser of certain premises in Cook County, Illinois, at a foreclosure sale had on September 10, 1917, and who received a master's deed on December 11, 1918.

On February 10, 1917, said John J. Flanigan, complainant, filed a bill to foreclose a trust deed upon the premises against William A. Gainer, Mary Gainer, his wife, Chicago Title and Trust Company, trustee, Herman Emerman, Forest E. Guthrie, Gustave T. Teller, and others, praying for the appointment of a receiver and such other relief as is usual in foreclosure bills. It was alleged in substance that certain principal notes, aggregating $3500, and coupon notes, had been executed on January 5, 1915, by Gainer and wife and delivered to Flanigan; that to secure the payment thereof Gainer and wife had executed and delivered a trust deed to said trustee; that default had been made and that under the terms of the trust deed the indebtedness had become due, etc. Summons was issued as to all parties and personal service was had upon the trustee, Emerman, and all other defendants named, except the two Gainers (mortgagors) and Gustave T. Teller. An affidavit was filed alleging that said Teller resided in Newaygo, Newaygo County, Michigan, and service was had as to him by notice by mail and by publication. The defendant

Emerson entered his appearance and on April 7, 1917, filed an answer, in which he alleged that he claimed an interest in the premises by virtue of a second mortgage trust deed, executed by said Gustave T. Teller and Mary Teller, his wife, and recorded in July 1916, conveying said premises as security for notes aggregating $2000 executed by said Tellers, which said notes were then due and payable to him (Emerson).

On April 14, 1917, Flanigan, by leave of court, filed an amended bill, in which he made substantially the same allegations and prayed for the same relief as in the original bill. The same parties were named as defendants, and in addition said Mary Teller and three other persons were made parties defendant. Summons was issued as to said four additional defendants and personally served on all, except Mary Teller.

On April 23, 1917, a receiver was appointed on complainant's petition and he entered upon and took charge of the premises, which were improved by an apartment building, and collected rents, etc.

On May 10, 1917, the affidavit of the Sheriff of Newaygo County, Michigan, was filed showing that both Gustave T. Teller and Mary Teller was served on April 30, 1917, with a copy of a notice of the pendency of the suit and a copy of said amended bill; that such service was had "by delivering to said Gustave T. Teller and Mary Teller, his wife, in person, a true copy of said amended bill of complaint together with a true copy of the above notice of the commencement of said suit."

On June 25, 1917, the court entered an order defaulting all the defendants named in the amended bill, except William A. Gainer and Mary Gainer, his wife (makers of first mortgage sought to be foreclosed and who apparently had not been in any manner served) and Herman Emerson (owner of second mortgage, who had answered). As to Gustave T. Teller and Mary Teller the

order of default stated that the former was defaulted "on proof of notice x x of the pendency of this suit by publication", and that the latter was defaulted "upon service by copy of bill and default 10 days at least before the return day."

On July 10, 1917, on motion of complainant, it was ordered that the original bill and the amended bill be dismissed "as to the defendants William A. Gainer and Mary Gainer", and the cause was referredto a master in chancery to take proofs and report the same together with his conclusions.

We think that the court had jurisdiction to enter the default of the defendants, Gustave T. Teller and Mary Teller, his wife. It appears from the transcript of the record that the former was served by publication under the original bill and also by a copy of the amended bill (which except as to additional parties named therein was substantially the same as the original bill) and copy of notice of the commencement of the suit; and that the latter was served by copy of the amended bill and copy of notice of the commencement of the suit. "The rule established by the authorities is, that no new process is, in general, necessary upon an amended bill, and an order for default can ordinarily be entered upon the original service notwithstanding the bill has been amended." (Meyer v. Meyer, 255 Ill. 436, 438). And we understand the law to be that where service in a chancery suit is had on two persons by delivering to them "a copy", it is a reasonable and proper construction that each of the two persons were served by copy. (Reed v. Moffatt, 89 Ill. 300, 301; Greenman v. Harvey, 82 Ill. 386, 388.)

On the hearing before the master evidence was introduced on behalf of complainant and also on behalf of Hermann Emerman (owner of the second mortgage). It appeared that said Gustave

T. Teller and Mary Teller, on July 10, 1916, executed and delivered certain notes aggregating $2500 to Emerman, to secure which they on the same day executed and delivered to Emerman, as trustee, their trust deed conveying to him the premises in question, which trust deedwas recorded on July 19, 1916 in the recorder's office of Cook county.

The master's report was filed on August 13, 1917, in which he found that the complainant, Flanigan, had a valid lien, superior to all other liens, upon the premises for the sum of $5515.27, together with costs, etc., and was entitled to a foreclosure of said trust deed, given by the Gainers, datedJanuary 5, 1915, and a sale of the premises; that the defendant, Emerman, was the owner and holder of said second mortgage or trust deed, and certain notes secured thereby, given by the Tellers, dated July 10, 1916; that he had a valid lien, though inferior to Flanigan's lien, upon said premises for the sum of $2153.05, together with costs, etc; and that the material allegations of complainant's bill were supported by the proofs, and that the equities were with the complainant. He recommended that the prayer of complainant's bill be granted and that a decree of foreclosure be entered.

On August 13, 1917, the court confirmed the master's report and entered a decree of foreclosure. In said decree it was ordered and decreed, <u>inter alia</u>, that, if the premises were not redeemed, upon the execution and delivery of a master's deed, the grantee, his heirs or assigns, should be let into possession of the premises, and that any person in possession thereof should, upon production of the master's deed and the service of a certifiedcopy of the decree, surrender possession to the grantee, his heirs or assigns, and

T. Teller and Mary Teller, on July 10, 1916, executed and delivered certain notes aggregating $2500 to Emerman, to secure which they on the same day executed and delivered to Emerman, as trustee, their trust deed conveying to him the premises in question, which trust deedwas recorded on July 19, 1916 in the recorder's office of Cook county.

The master's report was filed on August 15, 1917, in which he found that the complainant, Flanigan, had a valid lien, superior to all other liens, upon the premises for the sum of $6513.87, together with costs, etc., and was entitled to a foreclosure of said trust deed, given by the Gainers, datedJanuary 3, 1915, and a sale of the premises; that the defendant, Emerman, was the owner and holder of said second mortgage or trust deed, and certain notes secured thereby, given by the Tellers, dated July 10, 1916; that he had a valid lien, though inferior to Flanigan's lien, upon said premises for the sum of $3133.85, together with costs, etc; and that the material allegations of complainant's bill were supported by the proofs, and that the equities were with the complainant. He recommended that the prayer of complainant's bill be granted and that a decree of foreclosure be entered.

On August 15, 1917, the court confirmed the master's report and entered a decree of foreclosure. In said decree it was ordered and decreed, <u>inter alia</u>, that, if the premises were not redeemed, upon the execution and delivery of a master's deed, the grantee, his heirs or assigns, should be let into possession of the premises, and that any person in possession thereof should, upon production of the master's deed and the service of a certifiedcopy of the decree, surrender possession to the grantee, his heirs or assigns, and

in default thereof that a writ of assistance might issue.

On November 22, 1917, the master's report of sale was filed, showing that he had sold the premises on September 10, 1917, to complainant for $6,700, leaving a balance due to complainant of $85.13, and that he had executed and delivered to complainant a certificate of sale, and recommending that "a deficiency decreeshould be entered against the said defendants, Forest H. Guthrie, Gustave T. Teller and Mary Teller" for said sum of $85.13. On the same day the court entered an order, confirming the master's report of sale, finding that said defendants were personally liable to complainant for said deficiency of $85.13, and ordering and decreeing that they, Guthrie and Gustave T. and Mary Teller, should pay complainant the amount of said deficiency, with interest thereon from the date of sale, and that complainant might have execution therefor.

It is quite apparent that that portion of the court's order of November 22, 1917, wherein the court found that Guthrie and the two Tellers were personally liable to complainant for said deficiency and ordering that they should pay said amount, is erroneous, because of lack of evidence that they or any of them ever assumed or agreed to pay the indebtedness of the Gainers to complainant.

On July 6, 1918, Henry M. Ashton (appellant) filed his verified petition in the cause, in which he set forth in substance the prior proceedings and alleged that, after the receiver had been appointed and had taken possession of the premises and had collected rents, "Gustave Teller, <u>being then the owner of said premises</u>, together with his wife, executed and delivered to petitioner their deed of conveyance, conveying the above described premises", and that thereupon said Teller

"executed to your petitioner his assignment in writing assigning all his right and interest in and to said premises, and thereupon your petitioner became entitled to all the income from said premises." Petitioner prayed for an order requiring said receiver to surrender possession of the premises to him and to file a report and account.

On November 16, 1918, Finnigan (complainant and also the purchaser at the foreclosure sale) filed an answer to the petition in which he alleged that on February 10, 1917, "long before the said purported conveyance set forth in said petition is purported to have been made", he filed his bill of complaint to foreclose the trust deed mentioned in said bill; that "Gustave T. Teller was made a party defendant to said bill and had due and legal notice of the filing of said bill but refused to answer the same and therein made default"; that the decree of foreclosure was thereafter, on August 18, 1917, entered; that the premises had been sold by the master on September 10, 1917, and the deficiency decree entered; and he asked that the receiver be allowed to remain in possession until said deficiency decree had been satisfied.

On November 18, 1918, a hearing was had on said petition and answer and the court entered an order finding that said receiver had certain monies in his possession, and ordering certain disbursements to be made, and that the receiver pay to the petitioner, Ashton, the sum of $955.04, being the balance remaining, and that upon making the payments the receiver be discharged and that he surrender possession of the premises to Ashton.

On December 5, 1918, (five days before the expiration of the period of redemption from said foreclosure sale of

September 10, 1917) said Gustave T. Teller and Mary Teller, by said Ashton as their solicitor, entered their special appearance in the cause for the limited purpose "of moving to set aside the decree of sale entered on August 15, 1917, and the deficiency decree entered November 22, 1917"; and on the same day they filed their sworn petition, wherein they alleged, inter alia, that said decree of sale of August 15, 1917, "does not find any liability on the part of these petitioners and does not find any personal obligations on their part to pay or satisfy any deficiency decree which might be entered of record therein, and that said decree, as to these petitioners as defendants in this cause, is inoperative and void, and that said deficiency decree of November 22, 1917, is likewise void as to these petitioners." In compliance with a rule entered upon him, Flanigan, filed an answer to said petition.

On January 21, 1919, the court ordered that said deficiency decree, entered November 22, 1917, "against said Gustave T. Teller and Mary Teller" be vacated and annulled. The court made no order concerning the decree of sale of August 15, 1917, or concerning the court's subsequent approval of the master's sale thereunder.

On February 18, 1919, Flanigan filed his sworn petition for a writ of assistance, therein setting forth the prior proceedings and alleging that, subsequent to the date of said sale but prior to the expiration of the period of redemption, said Teller and wife, by warranty deed executed April 18, 1918, conveyed said premises to said Henry W. Ashton; that the period for redemption from said sale expired on December 10, 1918; that said premises not having been redeemed a master's deed conveying said premises to Flanigan was

executed and delivered; that, notwithstanding said Ashton has no greater or other rights in said premises than had his grantor, said Teller, (whose title was extinguished by said master's sale and deed) he, said Ashton, has collected rents from tenants in possession beyond the period fixed by statute for redemption and is threatening to dispossess some of said tenants for failing or refusing to pay to him rentals which had accrued subsequent to the expiration of said period of redemption; that petitioner (Flanigan) had exhibited to Ashton said master's deed, together with a certified copy of said decree of sale, and had demanded of him the possession of said premises, but that said Ashton had refused and still refuses to surrender possession of the premises to petitioner. Subsequently the three tenants in possession of certain apartments in the building on the premises filed their appearance and waiver in said cause and consented to the issuance of said writ of assistance.

On March 17, 1919, Ashton, as an "intervening petitioner" in the cause, filed his verified answer to Flanigan's petition for a writ of assistance, in which he alleged in substance that said Teller and wife, "being the owners of the premises described in the bill of complaint herein", had executed and delivered to Ashton their certain warranty deed conveying said premises to him, which deed had been recorded; that under and pursuant to said deed, and pursuant to the order of court entered in this cause on November 18, 1918, "he went into possession of the premises, and is now in possession thereof, collecting the rents" from said tenants; that said "purported decree of sale" of August 15, 1917, is void and of no effect "for the reason that no service of process thereunder was had upon the defendants",

Teller and wife and that said decree of sale "did not order and decree any indebtedness to be due and owing by the said Gustave T. Teller and Mary Teller, his wife, or either of them"; and that said master's deed issued to Flanigan, dated December 11, 1918, "is void and of no effect and is a cloud upon the title" of Ashton.

On the same day, as appears from the certificate of evidence, a hearing was had before the chancellor on Flanigan's petition for said writ of assistance, and Flanigan introduced in evidence (1) his written demand upon Ashton to surrender possession of said premises, (2) certified copy of the decree of foreclosure of August 15, 1917, (3) certified copy of the master's deed of said premises to Flanigan, dated December 11, 1918, recorded December 13, 1918, (4) written consent of the three tenants in possession, waiving demand for possession and consenting to the issuance of said writ of assistance; and Ashton introduced in evidence a warranty deed from said Gustave T. Teller and Mary Teller, his wife, conveying said premises to Ashton, the deed being dated April 18, 1918, and acknowledged by the Tellers on April 30, 1918.

At the conclusion of the hearing, and on the same day, the court entered an order that Ashton's said intervening petition be dismissed for want of equity; and the further order that the prayer contained in the petition of said Teller and wife, "so far as the same seeks to vacate the decree of sale entered herein on August 15, 1917", be denied, and that "to that extent said petition is ordered dismissed for want of equity, it appearing to the court that prior to the entry of said decree of sale the said petitioners had conveyed all their right, title and interest in and to said premises in said

decree of sale described." And on the same day the court entered the further order that a writ of assistance issue forthwith, commanding the sheriff to proceed without delay to put Flanigan in possession of the premises in question, "it appearing to the court that the complainant, John J. Flanigan, now is and has been, since December 11, 1918, the date of the execution and delivery of the master's deed in this cause, entitled to the possession of the premises."

From the order directing the issuance of the writ of assistance said Ashton prayed and perfected the present appeal.

It may be, under the authority of the cases of Noyes v. Clarke, 161 Ill. App. 227, and Kasslauer v. Whitaker, 88 Ill. 88, that the proper order, under the present record, is the dismissal of the present appeal, but we will consider it on its merits.

As above stated, we think that proper service was had upon the defendants Gustave T. Teller and Mary Teller and that the court had jurisdiction to enter their default. They are bound by the decree of sale, entered August 15, 1917, under which the sale of the premises, September 10, 1917, was made to Flanigan, and a master's deed issued to him on December 11, 1918. Ashton, being a grantee under the Tellers in April, 1918, is also bound by the decree. Counsel for Ashton here admit in their printed argument that Ashton "holds only through the Tellers", and is bound if the Tellers are.

And we do not think that the mortgagors, William A. Gainer and Mary Gainer, his wife, (who were originally made defendants to the bill and amended bill and subsequently dismissed as defendants) were indispensable parties, for the reason that the record sufficiently discloses either that they had assigned their equity of redemption or had sold and conveyed all their interest

in the premises before the institution of the present foreclosure proceedings. In Lunn v. Erskine, 17 Ill. 501, 505, it is said: "On a bill to foreclose a mortgage, the mortgagor, unless he has assigned the equity of redemption, is an indispensable party." In Brackney v. McClun, 243 Ill. 198, 199, it is said: "A mortgagor who has sold and conveyed all his interest in the mortgaged property before the institution of foreclosure proceedings, and against whom no relief is sought, is not a necessary party to such proceedings." (See, also, Watts v. Creighton, 85 Iowa, 134, 130.)

Many other points are urged in support of counsel's contention that the court erred in ordering the issuance of the writ of assistance. We have considered all of them and, under the condition of the present record, deem them to be without substantial merit. We think that the court's order granting the writ was proper. In Kerr v. Stanley, 193 Ill. 205, 207, our Supreme Court, in speaking of a writ of assistance, said:

> "This writ is a summary proceeding. x x Its object is to put a person, who has purchased at judicial sale under a decree in chancery, into possession of the premises. x x It will only issue against a party to the suit or one who has come into possession *pendente lite*. x x The interests of other persons will not be adjudicated in this summary manner. x x In this proceeding, like that of forcible entry and detainer, the question of title as between the plaintiff and the defendant, or any one else, cannot be tried. It is only a question of the right to possession."

The transcript of the record in the present appeal case was filed with the clerk of this court on October 8, 1919, to the October, 1919, term. On August 12, 1920, Gustave T. Teller, Mary Teller, his wife, and Harman Emerman, as plaintiffs in error, by their attorneys (of whom said Henry M. Ashton was one) sued out a writ of error from this court

(cause No. 26294) to reverse said decree of sale of August 15, 1917. A scire facias was issued, returnable to the present term of this court, October Term, 1930, and served upon said Flanigan, defendant in error, who subsequently entered his appearance in said cause, 26294. Summons was forthwith issued to bring into court all persons who were parties defendant to Flanigan's said amended bill to foreclose, filed in the Circuit Court on April 14, 1917, but said summons has not yet been returned into this appellate court. On October 11, 1930, said Teller and wife and said Emerman, upon due notice, filed their motion in said cause, 26294, that said cause be consolidated with the present appeal case, 25646, and that both be heard on the full record, and abstract thereof, filed in said appeal case, which should stand as and for the transcript and abstract in said cause, 26294, but that opposing parties should file separate briefs in the two causes. The motion was supported by written suggestions to the effect that if said motion was granted "the use of the record as contemplated will avoid additional expense and labor," and cause no inconvenience to court or counsel. Flanigan did not file any counter suggestions, and on October 13, 1930, during the present term, this appellate court entered an order allowing the motion, the effect of which order, if not modified, is to postpone thehearing of the present appeal case until the March,1931, term of this court, for the reason that certain other parties, as plaintiffs in error, do not appear to have been summoned, inasmuch as the summons issued has not been returned. On December 18, 1930, said Tellers and Emerman filed a motion, supported by written

suggestions, in said cause, 36294, to continue the same, as consolidated with the present appeal case, 25640, to the March Term, 1921, of this court, and to this motion Flanigan filed counter suggestions. On the same day Flanigan filed a motion in said cause, 36294, asking this court to vacate its order, entered October 13, 1920,(viz.: that the present appeal case, 25640, be consolidated with the writ of error cause, 36294, etc.) On December 30, 1920, this court ordered that the order of October 13, 1920, entered in said cause, 36294, consolidating the appeal case, 25640, therewith, be set aside and vacated, and also ordered that said writ of error cause be continued to the March Term, 1921, of this court.

For the reasons indicated the order of the Circuit Court, entered March 17, 1919, awarding said writ of assistance is affirmed.

ORDER AFFIRMED.

HARNES, P.J., and MATCHETT, J., concur.

444 - 18705

GEORGE F. PORTER,
Appellee,

vs.

LANDON GARELL ROSE,
Appellant,

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

1536

220 I.A. 649

MR. JUSTICE GAILLOY DELIVERED THE OPINION OF THE COURT.

On January 23, 1910, the plaintiff, Porter, commenced an action of the first class, in contract, in the Municipal Court of Chicago against the defendant, Rose. The cause was tried before the court without a jury, resulting in a finding of the issues against defendant and assessing plaintiff's damages at the sum of $4,569.30, upon which finding the judgment appealed from was entered on May 12, 1910.

The action is based upon a 99-year lease between the parties. In plaintiff's statement of claim there are four items: The first is for an installment of ground rent, which has since been paid and is therefore eliminated from the case. The second is for attorney's fees incurred, which by agreement at the trial were fixed at $300 in case the trial court should make a finding in favor of plaintiff. The third is for $3,969.03 paid by plaintiff in the purchase of a tax certificate. The fourth is for $300.26 commissions paid by plaintiff in the purchase of said certificate. The facts of the case are not disputed. The one question to be decided involves the legal interpretation of certain written instruments, and is whether defendant has been released and discharged from the payment of the several items mentioned. If he has not been so released and discharged counsel for defendant here concede that the amount of the judgment is correct.

By written lease, dated November 24, 1911, plaintiff

leased to defendant the premises known as 178 to 182 West Washington street, Chicago, Illinois, for a term of 99 years from December 1, 1911, at a certain stipulated rental. In the third paragraph of the lease it is provided that the lessee (defendant) shall pay all taxes and assessments, general or special, levied or assessed against the property demised during the term of the lease. In the fourth paragraph it is provided:

> "The lessee further agrees on or before the 1st day of May, 1917, to proceed to make valuable and lasting improvements upon the building situated on said ground at a cost of not less than $15,000, the same to be fully completed and paid for within ninety days after the 1st day of May, 1917. Before proceeding to make such improvements, lessee will deposit with Chicago Title and Trust Company of Chicago, Illinois, the sum of $15,000 in cash to secure the performance and completion of said improvements and the payment therefor."

In the ninth paragraph of the lease it is provided:

> "That the lessee shall not assign, transfer or set over, or otherwise by any act or deed procure to be assigned, transferred or set over, his estate in said demised premises under this lease unto any assignee whomsoever, until he shall have first duly completed (free from mechanics' or material men's liens and from any and all claims which might ripen into such liens) the improvements to said building at a cost of not less than $15,000, as provided by paragraph fourth thereof, * * nor unless all rents, taxes, assessments, water rates and insurance premiums, which shall have fallen due and become payable up to the time of such assignment, shall first have been paid, and the lessee be not then in default as to any covenant herein contained."

On January 1, 1913, by an instrument in writing, (in which defendant was designated as the first party, and George Lytton, Daniel J. Schuyler, Jr., and Leo J. Lesser, as the second parties, and plaintiff as the third party) defendant assigned and conveyed to said Lytton, Schuyler and Lesser all his interest in said lease and premises. And said assignees therein covenanted and agreed with plaintiff that they "do hereby jointly and severally accept and assume all the terms, covenants and conditions in said lease contained, and shall and will jointly and severally comply with and be bound by them, and keep, observe and perform

each and every of the conditions and covenants in said lease contained by the lessee to be observed and performed." However, by the terms of said instrument, defendant also covenanted and agreed to "remain personally bound by and liable under each and every of the covenants and conditions of said lease until the said second parties hereto" (said assignees) "shall have completed and said for (free from all mechanics' or material men's liens and from any and all claims which might ripen into such liens) the improvements on and to the building on said above described premises at a cost of not less than $10,000, as required by paragraph fourth of said lease." And it was further covenanted and agreed by all parties that there should be "no further assignment of said lease until such completion of any payment in full for said improvements to said building as required by the provisions of said fourth paragraph of said lease." And the plaintiff in said instrument waived any and all objections, which he might have or take advantage of, by reason of the assignment of the lease prior to the completion of said improvement on said building, and consented to the above assignment, and further agreed "that when said improvements shall have been completed and fully paid, leaving said premises free from mechanics' or material men's liens and from any and all claims which might ripen into such liens, then the party of the first part" (defendant) "shall be forever released and discharged from any and all obligations arising or accruing subsequent to the date hereof under the covenants and agreements of said lease."

Subsequent to the execution of said instrument of January 1, 1913, said leasehold estate, by three separate written instruments, dated respectively December 15th, 16th and 17th, 1915, was assigned and transferred to defendant and said Schuyler, in the proportion of a one-third interest in

defendant and a two-thirds interest in said Schuyler. Plaintiff was not a party to any of these instruments.

On November 10, 1917, an agreement in writing was entered into by and between plaintiff, as first party, (referred to therein as "lessor") and defendant and said Schuyler, as second parties, (referred to therein as "lessees"). After reciting the execution of said 99-year lease and of said instrument or assignment of January 1, 1912, and of said other assignments made in December 1912, the agreement further recited:

> "Whereas, by paragraph fourth of said lease it is provided among other things, that the Lessee thereunder should on or before the first day of May, A. D. 1917, proceed to make valuable and lasting improvements upon the buildings situated on said demised premises at a cost of not less than $15,000; and
>
> "Whereas, said parties hereto are now desirous of changing and modifying said provision of said lease as hereinafter specified."

and the parties agreed that the said lease, dated November 24, 1911, "shall be and it hereby is amended and modified as follows":

> "First. The Lessees shall not be required to make the improvements in paragraph fourth of said lease mentioned upon the buildings situated upon the premises aforesaid on the first day of May, A. D. 1917, but shall make the same on or before the first day of May, A. D. 1922, and the same shall be fully completed and paid for within 90 days after the first day of May, A. D. 1922.
>
> "Second. The Lessees shall for the purpose of securing the payment of rentals and all other indebtedness accruing under the terms of said lease from the Lessees to the Lessor, and the faithful performance on the part of the Lessees of all of the covenants and conditions in said lease contained, by them or either of them to be kept and performed, deposit in escrow with the Chicago Title and Trust Company of Chicago, Illinois, marketable bonds or other securities acceptable to the first party hereunder of the cash market value of $15,000 with an agreement executed by the Lessees that the same shall be held in escrow by said Chicago Title and Trust Company as security to the Lessor for the performance of the covenants of said lease, and the payment of all indebtedness accruing from the Lessees to the Lessor thereunder, and in the event of the default of the Lessees in the payment of any of such indebtedness that the said securities, or so much thereof as may be necessary, may be sold by said depositary, at public or private sale, after five (5) days prior notice to the

lessees, and the net proceeds thereof after the payment of all expenses of sale shall be applied by said depositary toward the payment of any such indebtedness then due from the lessees to the lessor. Any reduction in value of securities so deposited by reason of the depreciation of the market value thereof, or by reason of the sale and application of all, or any portion thereof, to the payment of the indebtedness of the lessees under said lease, as herein provided, shall be made good by the lessees from time to time upon notice or request from the lessor or from the said depositary by the deposit of cash or additional securities acceptable to the lessor, so that securities of the cash market value or at least $15,000 shall remain at all times on deposit with said depositary, until said improvements provided for in paragraph fourth of said lease, as hereby modified, shall have been completed and paid for. * *

"Third. In the event of the failure of the lessees to make the improvements upon said premises provided for in paragraph fourth of said lease as hereby modified on or before May 1, A. D. 1918, said securities deposited under the provisions of paragraph second of this agreement or any part thereof then remaining on deposit shall at any time after May 1, A. D. 1918, if the lessor shall so elect, be sold by said depositary and the net proceeds thereof be paid over to the lessor to be applied toward the construction of such improvements, but the lessor shall be under no obligation to cause the same to be done. The provisions of this paragraph shall not be construed as waiving or releasing or modifying the obligation of the lessees to make said improvements. When the said improvements shall have been completed and paid for, so much of said securities deposited under paragraph second or moneys received on account thereof, as shall not have previously been otherwise applied under the provisions of this agreement, shall be surrendered to the lessees."

On November 30, 1917, in accordance with the provisions of said last mentioned agreement, defendant and Schuyler deposited with the Chicago Title and Trust Company securities of the face value of $10,000, and the same were, at the time of the commencement of the present action and at the time of the entry of the judgment appealed from, still on deposit with that company. None of the contemplated improvements, or any part thereof, have been made.

Counsel for defendant here argue that "if the improvements contemplated by the lease and by the agreement of January 1, 1913, had been made * * defendant would have been released and discharged from all obligations under the lease", because "under the terms of said agreement defendant was held bound

only until said improvements had been made." But it appears that said improvements have not been made.

Counsel for defendant then contend that "the only purpose, under the agreement of January 1, 1913, in holding defendant to said lease was to secure the making of said improvements"; and that when the securities were afterwards deposited with said trust company "that purpose was accomplished so that plaintiff was thereby assured that said improvements would be made or said bonds and securities would be forfeited to plaintiff who would then make such improvements himself." We cannot agree that the purpose of said agreement of January 1, 1913, is to be so limited. By its express terms defendant was "to remain personally bound by and liable under each and every of the covenants and conditions of the lease until" said assignees of said lease "shall have completed and paid for" said uncompleted improvements. Furthermore, when said agreement of January 1, 1913, was entered into no securities had been deposited with said trust company, or other depositary, in fulfillment of the provisions of paragraph fourth of the lease. It would seem clear, therefore, that, after the execution of said agreement of January 1, 1913, and at least until the agreement of November 10, 1917, was executed, defendant remained liable to plaintiff for any breach of any of the covenants or conditions of the lease. Said assignees were also liable under the lease by reason of their covenants contained in said agreement of January 1, 1913.

Referring to the provisions of said agreement of November 10, 1917, as well as to those contained in said agreement of January 1, 1913, counsel for defendant further contend that "under a fair construction of these instruments, and the interpretations placed upon them by plaintiff in bringing this suit, it was the intent and purpose to release and discharge defendant

from all further obligations when plaintiff was secured for the making of said improvements to the extent of $15,000." We cannot agree with the contention. It is at variance with the express provision contained in said agreement of January 1, 1916, wherein defendant covenanted to "remain personally bound by and liable under each and every of the covenants and conditions of said lease" until said contemplated improvements should be "completed and paid for." And it is also at variance with the provisions of the second paragraph of said agreement of November 19, 1917, wherein the second parties to the agreement, designated as "Lessees", (i. e. defendant and Schuyler) agreed that "For the purpose of securing the payment of rentals and all other indebtedness accruing under the terms of said lease from the lessees to the lessor and the faithful performance of all of the covenants and conditions in said lease contained by them or either of them to be kept and performed", they shall deposit in escrow with the trust company bonds or other securities of the value of $10,000, and that, in the event of the default of the lessees in the payment of "any such indebtedness", said securities, or so much thereof as may be necessary, "may be sold" by the trust company and the net proceeds applied toward the payment of "any such indebtedness". These provisions contained in said agreement of November 19, 1917, disclose, we think, that said securities were not to be deposited solely to secure the making and paying for said improvements. And this construction is strengthened by the additional clause in said second paragraph, to the effect that, where any reduction occurs in the value of the deposited securities by reason of depreciation in market value or by reason of the application of any portion of the same "to the payment of the indebtedness of the lessees under said lease as herein provided", the same "shall be made good by the lessees * * so that securities of the cash market value of at

least $10,000 shall remain at all times on deposit with said depositary until said improvements * * shall have been completed and paid for." Furthermore, in paragraph third of said agreement, it is in substance provided that, in case of the failure of the lessees to complete the improvements by May 1, 1918, the lessor may cause the securities on deposit to be sold and net proceeds applied toward the construction of such improvements, "but the lessor shall be under no obligation to cause the same to be done"; and it is therein further provided that, when said improvements shall have been completed and paid, so much of said securities, "as shall not have previously been otherwise applied under the provisions of this agreement, shall be surrendered to the lessees."

Calls, under the provisions of said agreement of November 19, 1917, plaintiff might have applied some of the deposited securities to the payment of the various items above mentioned, he elected to bring this suit against defendant therefor, and we do not think such election is evidence of the adoption by him of the construction of said instruments in writing contended for by counsel for defendant. No point is here made by counsel for defendant as to the non-joinder of Schayler as a party defendant with Ross.

Our conclusion is that the trial court did not err in its construction of the instruments in question, that the defendant was not released from liability to plaintiff for the items sued for, and that the judgment of the Municipal Court should be affirmed.

AFFIRMED.

Barnes, P. J., and Hatchett, J., concur.

451 - 25712

EUGENE F. ROBERT, Appellee,

vs.

ANTHONY M. PETERS and ANNA M. PETERS, Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

220 I.A. 649

MR. JUSTICE BRIERLY DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek to reverse a judgment for $185 rendered against them, March 1, 1918, by the Municipal Court of Chicago, in an action of the fourth class in contract.

Plaintiff, an architect, alleged in his statement of claim that on or about June 1, 1916, he and both defendants (who are husband and wife) entered into a verbal contract whereby the defendants, in consideration of plaintiff's agreement to make plans and specifications for a building to be erected upon certain premises in Chicago and to superintend the construction thereof, promised to pay plaintiff, as a fee, five (5) per cent of the total cost of the building; that he prepared said plans and specifications, was ready and willing to superintend the construction of the building in accordance therewith but that defendants prevented him from completing the work, to his damage in the sum of $500. Plaintiff further alleged in his statement of claim, in what he termed a "second and further count", that his claim was for work and labor performed by him for the defendants at their request in said sum of $500.

Defendants entered their joint appearance and demanded a jury trial. In the affidavit of merits they denied that they ever entered into such a contract as stated

by plaintiff, and alleged that about June 1, 1916, plaintiff entered into a verbal agreement with the defendant, Anthony H. Peters alone, whereby the latter employed plaintiff to make plans and drawings for a certain building to be erected at a cost of not to exceed $5500 when completed; that it was expressly agreed that, if plaintiff was unable to prepare plans for such building at a cost of $5500 or less, plaintiff was to receive nothing for his services in drafting said plans; that plaintiff prepared plans but advised said Anthony H. Peters that the building to be erected in accordance with said plans would cost $7000 or over, and thereafter was unable to so modify the plans as to bring the cost of the building down to said amount of $5500; that by reason thereof said Anthony H. Peters was unable to construct the building and plaintiff's services were worth nothing to him; that the defendant, Anna H. Peters, never entered into any contract whatsoever with plaintiff; and that she is not jointly liable with Anthony H. Peters.

On the trial plaintiff, both defendants, and other witnesses testified. The jury returned a verdict finding the issues against both defendants and assessing plaintiff's damages at the sum of $165, upon which verdict the judgment appealed from was entered.

The evidence disclosed in substance that the defendant Anthony H. Peters was the owner of the premises upon which he contemplated erecting a residence building to cost not to exceed $5500; that he requested plaintiff to draw plans for such a building; that plaintiff prepared three pencil plans for buildings somewhat different; that these plans were shown to the defendant Anna H. Peters; that plaintiff solicited bids for the construction of a building in accordance with one of said

plans; that when the bids were opened it was found that all "ran over $9000" for the cost of a building in accordance with said plans; that many interviews were thereafter had between plaintiff and Anthony M. Peters regarding modifying the plans so as to reduce the cost of the building; that bids were solicited and obtained by plaintiff on two other occasions on plans as modified, but the bids were still considerably in excess of $9000; that subsequently Anthony M. Peters decided to "drop the whole proposition", so notified plaintiff, and offered him $40 for his services, which the latter refused to accept.

Notwithstanding that the evidence discloses that plaintiff, at the many requests of Anthony M. Peters, expended much time and labor in drafting plans, soliciting bids, etc., and is entitled to be paid by said Peters a reasonable sum therefor, still we feel constrained to reverse the joint judgment against said Peters and his wife, Anna M. Peters, because we fail to discover in the record any evidence that she had anything to do with the negotiations which were carried on between plaintiff and Anthony M. Peters, except that on one occasion, at her husband's request, she examined the first three sketches or plans, prepared by plaintiff, and expressed her opinion as to which one she favored. She never made any contract, express or implied, with plaintiff, nor did she join with her husband in making any such contract. Clearly, she is not jointly liable with him to plaintiff, and the judgment against her is unwarranted. And, "where in an action of assumpsit a judgment is entered against several defendants and it is necessary to reverse the same as to one, it must be reversed as to all." (Ford v. Rapid Transit Co., 206 Ill. App. 343, 356; Fuller v. Beth, 36 Ill. 446, 448; Claflin v. Ramsay, 129 Ill. 241, 248.)

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Matchett, J., concur.

399 - 25860

15382

PAPKIN SHAPERA and ANNIE SHAPERA,
Appellees,

vs.

BENJAMIN SMITH and JACOB N. SMITH,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

220 I.A. 649[3]

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the petitioner from an order entered by the Municipal court of Chicago, which denied a motion for a perpetual stay of an execution issued on a judgment of that court against appellants and in favor of appellees.

There is little dispute as to the facts. The judgment was entered by confession April 15, 1915, for the sum of $150 upon a power of attorney contained in a written lease, and for rent then due by the terms of the lease.

The ground of the application was that after the recovery of the judgment and before the service of the execution, an involuntary petition in bankruptcy was filed against the debtors in the United States District Court; that in such proceedings the judgment debtors were adjudicated bankrupts; that a receiver was appointed to whom all their property was turned over; and that on the 5th day of June, 1915, the judgment debtors were duly discharged from any and all claims, including the judgment on which the execution issued.

The petitioner set up that the judgment was one dischargeable in bankruptcy; that the petitioner's debtors in the bankruptcy proceedings had duly scheduled the said judgment as one of their liabilities. They produced and offered in evidence a certified copy of their schedule filed in the United States District

Court, being schedule "A3". They also put in evidence a certified copy of an order entered December 20, 1918, by the said United States District Court in that proceeding, discharging the petitioners from all debts and claims which existed on April 30, 1915, (the date on which the petition was filed against them.)

The above facts are undisputed. The judgment creditors, appellees, denied actual knowledge or notice of the proceedings, and we think such actual knowledge or notice was not established by the proofs taken. The judgment was one which was clearly dischargeable in bankruptcy, and we think the question at issue turns upon whether the indebtedness was duly scheduled within the meaning of the Bankruptcy Act, so as to entitle the bankrupts to the benefit of the statute as against these creditors. Section 7 of the Bankruptcy Act, Barnes Federal Code, 1919, page 2160, section 9091, makes it the duty of a bankrupt within a time fixed to prepare, make oath to and file in court "a schedule ----and a list of his creditors, showing their residences, if known; if unknown, that fact to be stated----."

The third subsection of section 17 of that act excepts from discharge debts which "have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."

In the instant case the judgment of appellees against appellants was rendered in favor of "Fannie and Annie Shapera." An examination of the schedule shows that the names of the creditors are given as "Fannie and Annie Shapire," street and address unknown, Chicago, Ill.; that the debt was contracted in Chicago, Illinois, in 1915; that it was on a judgment in the

Municipal court of Chicago, case No. 431458, the amount $152. It therefore affirmatively appears that the creditors in this case did not present in the schedule the true names of their creditors, although the schedule affirmatively shows that the sources of such information were open to them in the records of the municipal court. We think a bankrupt who fails through negligence or for some other reason to schedule the true names of the creditors, where, as here, he has definite information or means of getting it, cannot be said to have complied with the provision of section 7 of the Bankruptcy Act, and under the provisions of said section 17 is, as against such creditors, not entitled to the benefit of his discharge. We think therefore the petition for a perpetual stay of the execution was properly denied, and the order will be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

420 - 15673

1539

MARY DILTHEAY,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

220 I.A. 649

MR. JUSTICE MACSZYZ DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Railways Company, from a judgment of the sum of $5,000 entered upon the verdict of a jury in an action on the case for personal injuries.

The injuries for which plaintiff sued were sustained by her while riding in an automobile in Crawford avenue, in the City of Chicago, on the 13th day of October, 1917, when one of the street cars operated by defendant's servants came into collision with the automobile. The case was submitted to the jury on a single count, and defendant's brief argues that this count is fatally defective. But the point was withdrawn on oral argument so that as the case now presents itself we are asked to consider alleged errors in the refusal of the court to permit the continuance of the case after opening of the trial, certain instructions given, and the claim that the verdict is contrary to the overwhelming preponderance of the evidence.

The alleged error as to the continuance arose out of an occurrence during the examination of plaintiff by defendant's attorney. She was asked whether she had talked with a representative of the Street Railways Company, and upon answering in the affirmative she was asked:

"He talked with you about how this accident happened?

Answer: Yes, he told us if he could get us altogether, maybe he would give us a couple of dollars, and would shut it up."

On motion of defendant's counsel the matter in the answer not responsive to the question was stricken out, and the examination of the witness continued. On the opening of court on the following day counsel for the defendant called the matter to the attention of the court and stated in substance that having thought it over he had concluded the defendant had been seriously prejudiced by the fact that the jury, by means of plaintiff's nonresponsive statement, came to know "that the company offered to compromise the case." He, therefore, made a motion that the jury be discharged from further consideration of the case. The motion was denied. We do not think the court erred in this respect. That the statement volunteered by the witness was so prejudicial in its nature as to make it impossible to cure the harm by striking it out and instructing the jury to disregard it does not seem to have occurred to counsel for the plaintiff until the following day. We think, under the circumstances, defendant waived any right to have the jury discharged (if such right existed) by proceeding with the case before making the motion.

It is further argued that the court erred in giving plaintiff's instruction No. 2, which told the jury:

> "The court instructs the jury that if the negligence of two parties proximately contributes to cause an accident, through which a third part is injured, it is not alone a defense for one of said parties to show that the other was also guilty of negligence which contributed to cause the injury to the third party, if the third party was at and before the time of the happening of the accident, in the exercise of ordinary care."

It is urged this instruction assumes that there were two parties guilty of negligence; that it fails to confine the negligence to that stated in the declaration, and that it tends to relieve plaintiff of the fact of contributory negligence. It is further urged that a similar instruction has been held to be reversible error in the recent case of O'Brien v. Chicago City Ry. Co., 193 Ill. 147. The instruction there condemned told the jury:

> "That the fact, if it be a fact, that plaintiff's foreman was guilty of negligence which contributed to his injury, is no defense to this suit, provided you further find from the evidence that plaintiff did not in any manner cause, induce or contribute to said negligence, if any, on the part of said foreman."

In the opinion of the court this deprived defendant of its right to the "benefit of any facts and circumstances that would tend to show that the negligence of others, and not their negligence, was the proximate cause of the injury."

The instruction here complained of is not, we think, subject to that objection. The instruction did not direct a verdict and read in connection with the other instructions given, would not, we think, mislead the jury. While the language is not as clear and definite as might be desired, we think the instruction is not subject to the criticisms made on it.

It remains to consider defendant's further contention that the verdict is manifestly against the weight of the evidence, and the consideration of this point makes a review of the evidence necessary.

Many of the facts are uncontradicted. The accident occurred about 9.45 p. m. on the evening of Saturday, October 13, 1917, on Crawford avenue, a public street running north and south and at the north end of a viaduct, (which at that point runs under an elevated railway) and near to the

intersection of another street or highway known as Bloomington road. The weather was chilly and cloudy. Plaintiff, a married lady about thirty years of age, was riding in a five passenger Ford automobile owned by a friend, Mr. Parrott. There were six occupants of the car. Mr. Parrott drove and plaintiff's husband sat beside him in the front seat and on the right side of the seat. In the rear seat were the plaintiff who sat on the extreme left side, Mr. Chapman on the extreme right. Next to plaintiff sat Mrs. Parrott, and between Mrs. Parrott and Mr. Chapman sat Mrs. Chapman.

The families were friends of long standing. The automobile was entirely closed with curtains at the sides, and in the rear was what is known as an isinglass window. In the front was a glass windshield. The lights were burning on the front and rear of the automobile.

The plaintiff lived west of Crawford avenue on Jackson avenue, a street running east and west, and intersecting Crawford avenue. The automobile started from plaintiff's home with those six occupants as before described and was driven east to Crawford avenue, thence north on the east side of the street crossing several intersecting streets until it was struck at the top of the incline of the north approach of the viaduct. Crawford avenue was paved with bricks outside the car tracks and with granite blocks in the space occupied by the car tracks, and in the strip between them. There were two car tracks, northbound cars running over the east tracks and southbound cars over the west tracks. From the east rail to the east curb the brick roadway measured 15 feet. There was a city ordinance offered in evidence by the defendant which required all vehicles to keep as close to the right curb as safety and prudence would permit.

The street car with which the collision occurred was

of the "Pay as you enter type", about 30 feet long and carried about one hundred passengers at the time; some of them were riding on the front platform and several of these testified for defendant. There was no vehicle other than the automobile in the immediate vicinity at the time of the accident. The space between the street car tracks and the curb was unobstructed. There is evidence tending to show that the roadbed of the street was rough and worn in some places, but not to any considerable extent immediately near to the accident.

There is a sharp conflict in the evidence as to the circumstances immediately preceding and attending the accident. The evidence for plaintiff tended to show that after the automobile turned into Crawford avenue it proceeded on the east side of the street; that just before reaching North avenue (an east and west street intersecting Crawford avenue) the auto drove up behind a northbound car; that the car stopped there for passengers , and also at Nebraska avenue, another intersecting east and west street, and that on each occasion the automobile stopped behind the car; that just after the street car passed Nebraska avenue, the automobile was driven past it and continued northward on the east side of the street; that about 300 feet south of the entrance to the viaduct, another automobile was standing at the east curb, and that the machine in which plaintiff was riding was turned east in order to avoid it; that it proceeded in the same manner as the viaduct, but near to the northbound track, when, without warning, it was struck by the northbound car going at a tremendous rate of speed.

On the contrary, the defendant's testimony tended to prove that the street car was proceeding north at a speed of about 12 miles an hour; that no automobile was in front of it, nor on the roadway near to the tracks; that when it approached

the point of the accident and had passed under the elevated structure the automobile approached going from side to side; that it passed the car at a speed of from 30 to 35 miles an hour, and that when the rear of the car got 5 or 10 feet north of the front of the street car it wiggled back and forth tipping upward and at an angle of about 45 degrees when the street car collided with the top of it. That the motorman threw off the power, applied the brakes and threw sand on the track immediately when he saw the danger, but was unable to stop the car in time to prevent the accident.

Defendant says that measured by every test of credibility the evidence of defendant manifestly outweighs that of plaintiff; that as to the number of witnesses seven support its version of the occurrence, while only five, including plaintiff, testified in her behalf. That its witnesses are disinterested; that plaintiff's witnesses had suits pending against defendant growing out of the same alleged cause of action, and the testimony of defendant's witnesses is therefore entitled to the greater weight; that some of the witnesses for plaintiff were her relatives, one being her husband, and another her husband's sister. That as to the opportunity of the witnesses to observe and see and know the testimony for plaintiff should be given the greater weight, because plaintiff's witnesses were riding in a closed carriage where they did not have equal opportunity to see and know the facts. That the defendant's witnesses tell the more reasonable story and are positive in their statements, while those of plaintiff's are indefinite and uncertain.

All of these observations, we do not doubt, were presented to the jury which tried the case with the same ability, zeal, skill and earnestness as these arguments are now presented to us.

The fact that the jury who saw and heard all the witnesses rendered a verdict on which the judge, who also saw and heard these witnesses, entered judgment, is entitled to considerable weight. Nor are arguments lacking on the other side on these points.

After calling attention to the fact that "probably none of the jurors ever saw just such an happening," defendant says, "Why should the defendant's witnesses have narrated such a strange happening, unless their narrative is true?" "The very fact that the narrative of a witness, say, on its face seem strange and unusual, is sometimes a reason for accepting it as truth." And passing from the realm of law into that of theology, defendant says: "Hume did not disprove the miracles of the New Testament by showing that the positive testimony in their favor, was, in the highest degree, improbable." "The Bible tells us that when Joseph's brethren returned to their father and told him Joseph was yet alive and governor over all the land of Egypt 'Jacob's heart fainted, for he believed them not.'"

While we hesitate to follow defendant in its discussion of theological problems we venture to suggest that the instant case may be quite easily distinguished from those cited. As we understand the record this is not a case where positive evidence of an extraordinary fact is uncontradicted. On the contrary, the evidence for defendant is contradicted by all the occupants of the automobile, whose opportunity for knowing the truth, we think, was in some respects not inferior to that of the witnesses who testified for the defendant. There were two very important and material issues of fact; first, whether the automobile passed the street car immediately preceding the accident, as defendant's witnesses say and plaintiff's witnesses deny, and second, whether the automobile tipped or wiggled before it was struck as defendant's witnesses

way, or after it was struck, as plaintiff's witnesses alleged. If prior to the accident the automobile flipped as plaintiff's witnesses says, the six occupants of the car could not have been ignorant of that fact. Indeed, as the evidence shows, it was dark at the time, and their opportunity to know the truth about this was very much superior to that of defendant's witnesses who were on the car.

As to the question also as to whether the automobile passed a car immediately prior to the accident, while plaintiff's witnesses may have had less opportunity to see, they did not have less opportunity to hear, and the evidence is uncontradicted that the street car did not proceed noiselessly. While plaintiff's witnesses were, in a sense, interested, their testimony on the whole does not appear to us to indicate dishonesty.

And we think, moreover, without at all questioning the good intentions of defendant's witnesses their evidence was in some respects inconsistent, and in others included facts physically impossible. For example, all of them say that the automobile was proceeding at a greater rate of speed than the street car, placing that speed at from 25 to 35 miles per hour, while it is stated that the street car was going at a rate only of from six to 10 miles per hour. Yet according to the testimony of defendant's witnesses, in what must have been only a few seconds of time, the slow going street car overtook and struck the faster moving automobile. It is peculiarly the province of the jury to pass upon issues of fact where the evidence conflicts as it does here. The rule applied by this court in reviewing such a record is that the verdict will not be disturbed, unless upon an examination of all the evidence it is found to be clearly and manifestly against the weight of it. We do not find that condition present in this record and the

Judgment will therefore be affirmed.

AFFIRMED.

Burnett, P. J., and Gridley, J., concur.

437 - 25,095

LAMBERSON JAPANNING COMPANY,
a corporation,
Appellee,

vs.

NEEDHAM MANUFACTURING COMPANY,
a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

1540a

220 I.A. 649

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued the defendant in the several counts of its declaration setting up an alleged contract whereby the plaintiff agreed to japan for defendant its entire requirement for checkwriters, during the period of one year from the 11th day of November, A. D. 1915, for the sum of 25 cents each, upon terms and conditions as mutually agreed on; that the defendant wrongfully on the 11th day of April, 1916, prevented and hindered the plaintiff from completing its work, and refused to supply to plaintiff any of the checkwriters to be prepared, whereby the plaintiff lost the profits which would have accrued to it under the terms of the contract.

To this declaration the defendant pleaded the general issue, and the cause was tried by a jury. At the close of plaintiff's evidence, and again at the close of all the evidence, defendant made a motion for an instructed verdict in its behalf, which was denied. The jury returned a verdict for the plaintiff and assessed its damages at $2,756.42, from which the plaintiff remitted the sum of $421.80, whereupon the court, overruling the motion of defendant in arrest, entered judgment on the verdict for the

sum of $2,344.75. This appeal followed.

Appellant first insists that there was no contract between the parties as alleged; that the supposed agreement is void for lack of mutuality, and the minds of the parties never met with reference to its terms. This contention is based on the theory that certain letters in evidence contain the entire agreement between the parties, but we find on examination of the evidence that these letters only contain a part of the contract, and we thinkthat oral evidence as to terms of the agreement, not inconsistent with the writings, was properly received, and that the court was justified in holding that the result of the entire evidence was to prove the contract substantially as alleged.

It is next contended by the appellant that the evidence shows that plaintiff did not comply with the terms of the agreement which were binding upon him, and that defendant was therefore justified in breaching the contract, and that the plaintiff is thereby precluded from recovery. But this contention raised issues of fact which were, we think, properly submitted to the jury.

It is next urged that the court erred in admitting in evidence letters of the plaintiff to defendant which it is claimed are selfserving statements. On June 30, 1918, the plaintiff addressed a letter to the defendant, in which it said:

> "In looking over your account for the month of June, we find that we have not received any work from you, and inasmuch as we have space and special equipment set aside for doing your work in our shop, and we are also continuing to hold together the men who are especially skilled in handling your work, we would be pleased to have you advise us what we may expect in the future.
>
> You will understand that it will take us a little while to catch up deliveries again when you start sending your work over, since we should have about 1000 sets in process in our shop at all times, in order to deliver

you the usual amount."

On July 1, the defendant replied:

> "We acknowledge receipt of yours of the 30th, and in reply will state that the attention you have given our work has not been very satisfactory.
> We have been able to make other arrangements whereby we can get more prompt service, and also a better price.
> We will, therefore, be unable to offer you any encouragement as to the prospect of handling our work in the future."

On July 26, the plaintiff wrote defendant as follows:

> "Upon returning to my office after a short absence, I was quite surprised on reading your letter of July 1st, in which you state that you have made other arrangements to have your checkwriters jugmmed.
> I would advise that the work done for you by us has been even better than the contract sample, and the work was delivered to you as promptly as you supplied the parts for finishing and our contract with you was complied with.
> We have been and are now and will be in the future be ready, willing and able to comply with our part of the contract with you on the basis of the one year terms therein provided, and we shall expect that you will also comply with your obligations in this contract. As you well know, special expense was incurred by us in arranging to prepare to perform our part of the contract, made with your company, and we cannot and will not sustain this loss in your refusing to comply with this contract.
> Will you be kind enough to advise us what your intentions are in the matter."

This last letter was objected to by the defendant when offered in evidence by the plaintiff on the ground that it contained selfserving declarations, but was admitted and allowed to go to the jury. We cannot think this letter was admissible when offered by the plaintiff. The preceding letter from defendant did not call for a reply. On the contrary, it appears to be the final correspondence, so far as defendant was concerned. There is no answer by defendant to this letter of July 26, which the letter itself is either useful or necessary to explain, or which would be unintelligible without it. The contents are clearly selfserving, and it was error to permit it to go to the jury. Schwarzschild & Sulzberger v.

Pfaelzer, 133 Ill. App., 246.

Appellant also complains of instruction No. 14 given to the jury at the request of the plaintiff. It was as follows:

> "If you find from the evidence that the plaintiff and the defendant entered upon the performance of the contract, as alleged in the plaintiff's declaration, and that the plaintiff did japan all of the parts of checkwriters submitted by the defendant to the plaintiff during the period covered by the contract, and that the same were equal to the samples submitted when the contract was made, if any, and redelivered by the plaintiff to the defendant as it was so japanned, you will find as damages for plaintiff, such amount as you consider equal to the profit which the plaintiff would have realized, had it been permitted by the defendant to do all of the japanning of the defendant during the entire year of the contract, less the amount of profit the plaintiff did, in fact, realize upon such checkwriters or parts of checkwriters as the defendant did, in fact, submit to the plaintiff, and the plaintiff japanned."

This instruction in effect directed a verdict and is, therefore, subject to the criticism that it ignores the defense on which defendant relies, and which he offered evidence tending to prove. That the giving of such instruction constitutes reversible error, has been often decided. Cardwell v. Butler, 168 Ill. 504; Rooney v. City of Chicago, 239 Ill. 414; Sage v. City of Vienna, 196 Ill. App. 385.

Other errors are argued which we deem it unnecessary to discuss. For those indicated, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

15412

448 - 25709

JOSEPH PIKORA,
Appellee,

vs.

ROYAL NEIGHBORS OF AMERICA,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

220 I.A. 650

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant on a benefit certificate issued by defendant to one Elizabeth Pikora, which certificate was, by its terms, payable in the sum of $1,000 to plaintiff, at the death of said Elizabeth, who was his wife. The declaration alleged the death of the insured on February 18, 1918, the giving of notice and due proofs of death, and compliance with all the terms of the policy by the insured and the beneficiary. It also alleged that the defendant had refused to make payment. To this declaration the defendant filed three pleas, in the first and second of which it is averred that the death of Elizabeth Pikora occurred on the 18th day of February, 1918, "as a result of self-inflicted abortion or miscarriage or attempt thereat"; and in the third of which it is alleged in substance that her death resulted "directly or indirectly from an attempted or completed intentional abortion or miscarriage, not done upon the advice of a physician in an attempt to save the life of the insured." Each of the pleas alleged that by reason of the manner of said Elizabeth's death, plaintiff under the contract sued on could not recover. Replications were filed, taking issue on these pleas, and the case was submitted to the jury on these issues of fact.

The verdict was for the plaintiff, and on this verdict

the court entered judgment, overruling motions for a new trial and in arrest of judgment.

At the beginning of the trial the defendant admitted a prima facie case for the plaintiff, and assumed the burden of proving the material facts stated in its plea. It introduced in evidence the benefit certificate, the fifth paragraph of which provided among other things, that "if death shall result from criminal or self inflicted abortion or miscarriage or attempt thereat", the certificate should become null and void and of no effect. It put in evidence the by-laws of the order, section 336 of which contained a similar provision.

The attending physician was called by defendant and testified that he attended the deceased about February 11, 1918, that he found her having a uterine hemorrhage. She said she did not know how it started; that she had done her washing and lifted some tubs, and that it started afterwards; that he treated her, but that on the 13th of the month found her bleeding and called in another doctor. That witness saw her every day thereafter until she died. He says that he advised she be taken to a hospital, which the family would not do; that he asked her if she was pregnant, to which she replied that she had gone past her time a few days; that he was present when another doctor (Dr. Goufert) questioned her, and asked her if she had used any instrument on herself or any stick; that she indicated that she wished her mother to leave the room; that her mother left and the deceased then said "that she did use a stick in the forenoon of the preceding Saturday, in the bathroom"; that she had used it twice and felt faint; that nothing was said by her as to the reason for doing this; that the mother returned to the room while the conversation was going on; that Dr. Goufert asked deceased if she would sign a statement of the facts, and proceeded to

make a statement for her to sign, but the relatives rushed into the room and demanded that no statement should be signed and that the witness then tore up the statement. This was on the day before she died.

He further stated he did not see her again and that she died of "septicaemia or blood poisoning", and that he did not know the cause of it. He said he did not see any sticks there, but that the husband (plaintiff) described a stick, not, however, in the presence of the deceased, but in the front room. The husband indicated the stick, about six inches long, and that it had a little blood on it, then fell over in a faint.

On cross examination the witness said he did not find in examination any evidence of foetus.

Dr. Seufert, who appears to have been the regular family physician and who was first called for to treat deceased, but was unable to come at that time, testified for defendant that he was called from the hospital, and that when he arrived at the house, he saw the husband who said, "I am very sorry, but we had to get a doctor in a hurry"; that witness replied, "that is alright"; that the witness was called again three or four days later and saw the deceased at that time, talked with her and made an examination, and as he says, decided that she was dying of septicaemia. He says:

> "So I went outside into the other room and told Dr. Gaggin what I had found, and I said to the doctor 'What has been going on here.' I then called in the husband and said, 'There has got to be no fooling. I have got to get the truth of this thing' * * * I said, 'Has this woman done anything, or has she had anything done with her?' Then he told me that she had inserted a stick into her womb, and I asked how many days previously, and he said that was before Dr. Gaggin first saw her; in order to produce an abortion. Now I asked him if he could let me see the stick. They looked for it but could not find it. Then I went back to the patient once more. They all followed me in there, and the patient made a motion to have her mother put out of the room.

and the mother was put out of the room. That left, I believe, the doctor and the husband in the room, the husband, the other doctor and myself. I asked her, I said, 'What have you done ', and she said, 'Nothing'; I said, 'Why you used a stick', and she said, 'Well, I did not want my mother to know.'"

The plaintiff, testifying in his own behalf said that he had a conversation with the doctors in the parlor. He says:

"They asked me if I saw some substance that indicated that my wife used something. I did tell them I did see a stick. I told them I did not know what it was, or anything. I saw it on the floor between the kitchen and the bedroom, by the bathroom door. I did not at any time or at that time tell the doctors that my wife had used a stick on herself. * * They asked me if I knew where the stick was, and I told them I didn't. I did tell them about the length of it, indicating that it was about five or six inches long, and looked similar to kindling wood. I did tell them where it was on the floor, between the kitchen and the dining room. * * They did not ask me to go and find it, when I told them I had seen the stick. I didn't say exactly 'blood', I said it was stained like it, possibly looked like blood. No, there wasn't anything else said at that time about the stick, not at that time. I didn't find the stick, no, I didn't look for it. I did find it afterwards; that is, the stick, but there is shavings taken off; that is the same stick, yes, it is the same stick; it was a little darker at the time I seen it. For that is the stick I spoke about having seen and I told them about. I saw the stick on the floor between the kitchen and the dining room. I did not say my wife had told me that she used the stick last week. No, I did not know at that time or have any information about that, that they used a stick there at any time. No, I have not had any information since."

On cross examination the witness said he didn't go to look for the stick that day, he thought he found it about eight days afterwards, six days after his wife was buried; that he had seen it before she died, on either Saturday afternoon or Sunday morning; that he pushed it over with his foot, looked at it and pushed it over on one side, and after she died, "I run across it, taking it up". He says that when he saw it the second time it was in the bathroom, right under the edge of the bathtub; that he picked it up, wrapt it up in a piece of paper, because he had mentioned it to the doctors, and if anything was said he would have it.

Afterwards Dr. Tenney of the city laboratory was called, and in response to questions by plaintiff's attorney stated that the stick had been handed to him by the plaintiff several weeks before the trial, and was then substantially in the same condition as when it was given to him, except a few whittlings which he had made on it; that plaintiff had asked him to determine whether the stains on it were blood or not, and that he had removed certain portions of the stains and subjected them to tests to determine that question. He was then asked, "What did you find?" whereupon defendant objected, stating that the stick was not going to be admitted into evidence, and it was, therefore, not proper to ask about it. Thereupon the attorney for the plaintiff offered the stick in evidence, to which defendant objected on the ground that there was not sufficient foundation laid for it, stating that there was not anything to show it was the same stick about which the witness talked to the doctors, or that it was the same one that was seen and that was there in the flat. The court overruled the objection, stating: "Without expressing any opinion as to the weight of the evidence, I think it is sufficient for the purpose of being admitted, the witness Fikers having stated this is the stick that he found. The only reason it was not admissible before was because it was not shown to be in the same condition as it was when he found it. Now the evidence has been supplied." Mr. Fulton: "There has been no evidence as to where it has been since the time he found it." The Court: "There may be something in that. There is one thing Mr. Walker, your question was, 'Is that the same stick that I gave you - from you.' You might have to show what happened to the stick during the time he said he found it and put it in a piece of paper until the present time." Mr. Walker: "That might be so, although he said it is in the

same condition as it was when he found it, except the shavings being off." The Court: "I think there is enough to be admitted. * * have your point, it may go in." Thereupon the stick was received in evidence, and the witness permitted to testify that the stains thereon were not of blood.

It is urged by appellant that the court erred in admitting the stick in question in evidence, and this for the reason that under the evidence it was relevant to no issue in the case. Without doubt the admission of the stick, if improper, was a serious error, because evidence of this kind is quite likely to have improper weight with the jury. Jones on Evidence, Vol. 5, Sec. 1197. The stick itself has been preserved, and by direction of the trial court attached to the record for our examination. If the jury believed that it was the contention of the defendant that the deceased had attempted an abortion upon herself by means of this exhibit, we think it would have had a tendency to lead them to find the issues for the plaintiff for the reason, as appellant says, that no sane person would attempt an act of this kind with an instrument of this sort.

We are somewhat at a loss to understand on what theory it was admitted. The defendant did not claim or offer any proof tending to show that this stick was the instrument by which the alleged abortion was performed, and the theory of the plaintiff was, and he testified positively that no abortion had been performed with an instrument of any kind. As applied, therefore, to the real issue in the case the exhibit was wholly irrelevant. Nor do we think there is evidence sufficient to identify this exhibit, as being the particular stick about which plaintiff talked to the doctors.

The further contention of appellant is that the court erred in giving instructions Nos. 3, 4 and 5, being

plaintiff's instructions as modified by the court. In each of these instructions the court told the jury that the mere fact, if it is a fact, that Elizabeth Pikora died of an abortion created no presumption that the defendant was not liable under the policy, that under such plea the burden of proof was upon the defendant under said plea, not only to prove that said Elizabeth Pikora died of an abortion, or attempt thereat, as charged in the plea, but that her death proximately resulted from such act. In each of the instructions it was stated that unless the jury so found "it is your duty to find the defendant guilty as to said plea."

If the defendant had sustained any one of these pleas it was entitled to a general verdict in its favor. Strictly speaking, therefore, it could not be found guilty on any one of its pleas, and we think the use of this word, as applied to each of these three pleas was misleading, and might have caused the jury to think that unless the defendant had sustained all its pleas there should be a verdict for the plaintiff. It was not the duty of the jury, under any one of the pleas, to find the defendant guilty as to said plea, unless the jury further believed from the evidence under the instructions of the court, that neither the plea named nor any one of the three pleas, which there was evidence tending to prove, had been sustained.

The situation here is not analogous to those where the jury is sometimes properly instructed that if it believes a certain state of facts it may find the plaintiff() guilty under a certain count of the declaration, naming it, because in such cases the plaintiff is entitled to a verdict, if the evidence be sufficient under any one of the counts. In a case like this one, where the defendant filed special pleas just the reverse is true, and the defendant is entitled to a verdict if the evidence

sustains any one of the pleas interposed.

It is also claimed by the appellant that the instructions are erroneous in that the court in them expresses an opinion upon the weight of the evidence, and we think there is merit in that contention also.

For the reasons indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

468 - 25729

15422

ANNA L. GOOD,
Appellee,

vs.

EMILIE BARNETT,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

220 I.A. 650

MR. JUSTICE BARNETT DELIVERED THE OPINION OF THE COURT.

The plaintiff below, appellee here, sued the defendant in trover for the value of a gold mesh bag which she alleged the defendant had converted to his own use about January 1, 1918. The bag was alleged to be of the value of $500.

The defendant in his affidavit of merits denied that he converted the bag as alleged, and denied that it was of the value of $500, but on the contrary alleged that he had purchased the bag from plaintiff at its then value, which was $25. The cause was tried by the court, without a jury, which found in favor of the plaintiff and entered judgment in her favor for the sum of $125.

Appellant first contends that the evidence showed a sale of the bag to defendant by plaintiff, with a subsequent agreement to share profits with her in case of a resale.

The plaintiff testified that she delivered the bag to defendant in order that he might sell it, and that pending such sale he loaned her $25 on it. She is corroborated in this testimony by Miss Drake, a stenographer and a friend of plaintiff, who testified that she called at defendant's store with plaintiff in January, 1917, at which time the matter was discussed, and that plaintiff then told the defendant "she had not the money to pay the interest on the money she had gotten." He said that was all right, that he would not charge any interest; that he would be

glad to do what he could for her, and he would try and sell the bag. This witness further testified that defendant at that time showed the bag to plaintiff and herself at plaintiff's request. She says, "It was a mesh beaded bag with gold top. The body of the bag was beads. I could not tell the kinds; but I remember it had a heavy gold chain and a gold top set with aqua-marine stones."

On the other hand defendant testified that prior to this transaction he had purchased some gold chains from the plaintiff and paid for some; that about ten days later plaintiff brought the bag in question to him and asked him if he could use it, and that he told her that he could only use it for the intrinsic value of the gold frame, which he stated was about $25; that plaintiff said it would be a shame to sell it for $25, and that he told her that if he could sell it for more he would split the profits with her, and that she said that would be agreeable; that he afterwards put the bag in the showcase of his store and tried to sell it; that having kept it four years he in 1913 "decided it was time to break it up, as we frequently do;" that he did so and got the value of the metal, which was $21; that prior to that time he had offered it for sale at $75 with plaintiff's knowledge.

Defendant is in part corroborated by the testimony of his sister, who worked in the store with him. On this point, therefore, as to what the actual contract between the parties was the evidence is conflicting, and the trial court had the advantage of seeing the witnesses. We think we would not be justified in reversing the judgment on the theory that the evidence does not sustain plaintiff's contention in this respect.

The appellant next contends that there was no evidence to warrant the court in assessing the damages at $125. Appellee obtained leave in this court to assign cross-errors, and we find in

the files a paper purporting to contain an assignment to the effect that the court erred in excluding evidence offered by the plaintiff on this point. However, the files are not a part of the record, and rule 12 of this court provides that assignments of error must be "written upon or attached to the record."

The general rule as to the measure of damages for the conversion of personal property is that the defendant is liable to plaintiff for the fair cash market value of the property converted at the time and place of conversion with interest. Stamps v. Smith, 37 Ill. 481; Kenney v. Parson, 201 Ill. 79.

Plaintiff testified that the bag was a gift to her, and the court by an examination of defendant brought out the fact that the bag at the time of the trial would, if new, cost him $300, and that one not a dealer would have been compelled to pay $300 therefor. Plaintiff testified that she told defendant at the time she delivered the bag to him that it was a $300 bag. She also testified that the bag was in perfect condition; that she had only carried it out twice after it was given to her, and that the rest of the time it had been in a locked box, sometimes in the safe and sometimes in a drawer, and that the bag was substantially new, as indicated by the fact that defendant put it in a sales window.

We think from this and other evidence the court was justified in finding the damages at $150, and the judgment will therefore be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

1543a

478 - 25739

WALTER L. BOWEN, Appellee,

vs.

WILLIAM CURY & SONS COMPANY, a corporation, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

220 I.A. 650

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This suit was begun by plaintiff filing an affidavit of replevin in which he alleged that he was the owner of and entitled to the possession of one Dodge automobile. A writ of replevin issued and the officer returned the same "Served by reading to an agent of the defendant corporation", and demanded the property, which was refused. Thereafter the court granted leave to plaintiff to file what the record denominates "a count in detinue," and the plaintiff filed a count or statement of claim in which he alleged that he was the owner of and entitled to the possession of one Dodge automobile of the value of $900; that defendant on March 17, 1919, became possessed of said property for the purpose of repairing the same, and on May 13, 1919, refused and failed to return said chattel on demand by plaintiff and tender of defendant's lawful charges for said repairs, and now unlawfully detains same, etc. Therefore the plaintiff claimed damages in the sum of $250 for detention thereof. The case was tried by the court which heard the evidence of the respective parties.

It was undisputed that the automobile was delivered to the defendant for the purpose of making certain repairs thereon, but the plaintiff claimed that defendant had made repairs which had not been requested, and that the charges

made were excessive. There was proof tending to show that prior to bringing the suit the plaintiff offered to pay to defendant's bookkeeper for these repairs the sum of $115, which was refused. At the conclusion of the evidence the court entered the following judgment:

> "The court finds that the right of property in the automobile described in plaintiff's statement of claim, is in the plaintiff, subject to a lien in favor of defendant, to secure payment of the sum of $125 due to the defendant, and the court finds the value of said automobile to be the sum of $500. Defendant moves that judgment be arrested. Motion overruled.
>
> And this cause coming on for further proceedings herein, it is considered by the court that final judgment be entered on the finding herein, and it appearing to the court that said property is rightfully held by the defendant for the payment of the said sum of $125, it is considered by the court that the plaintiff do within five days after this date pay to the defendant or to the clerk of this court for the use of defendant, said last mentioned sum of money and interest thereon from this date until paid, at the rate of 6% per annum; and in case said payment shall be made, as aforesaid, it is considered by the court that the plaintiff have and recover of and from the defendant the property described in plaintiff's statement of claim, and that execution issue herein against the defendant for the restoration of said property to the plaintiff, and any execution to be issued, as aforesaid, shall provide that if said property shall not be found, there shall, at the option of the plaintiff, be made the value of said property, as aforesaid, to wit, the sum of $500, at plaintiff's costs, as aforesaid."

Appellee makes the claim in support of this judgment, that as no denial of the statement of claim was made, its allegations must be under the rules of the Municipal Court taken as admitted. These rules, however, are not preserved in the record and we cannot take judicial notice of them. The evidence clearly does not sustain the findings of the court. No proof was offered tending to show that the value of the automobile was $500, but aside from this we think this judgment cannot stand. The law of replevin in this State was "revised" by the Act in force July 1, 1874, Hurd's Revised Statutes, 1919, pages 2459-62. By the first section of that Act it is provided that replevin will

lie either for wrongful taking or wrongful detention of goods and chattels. By the fourteenth section it is made the duty of the officer having the writ to -

> "forthwith execute such writ by seizing and delivering the property therein mentioned to the plaintiff or his agent, and by reading such writ to the defendant if he can be found."

The eighteenth section provides that when the property or any part of it has -

> "not been found or delivered as aforesaid, and the defendant is summoned or enters his appearance, the plaintiff may declare in trover for such property * * * and * * * damages."

The twenty-second section provides:

> "If the plaintiff in an action of replevin fails to prosecute his suit with effect, or suffers a nonsuit or discontinuance, or if the right of property is adjudged against him, judgment shall be given for a return of the property and damages for the use thereof, from the time it was taken until a return thereof shall be made, unless plaintiff shall, in the meantime, have become entitled to the possession of the property, when judgment may be given against him for costs and such damage as the defendant shall have sustained; <u>or if the property was held for the payment of any money</u>, the judgment may be in the alternative, that the plaintiff pay the amount for which the same was rightfully held, with proper damages, within a given time, or make return of the property."

It is apparent from a reading of the statute, as well as from the nature of the proceedings, that the judgment of the court is made to depend (under a state of facts such as was shown to exist here) upon whether the property is delivered to the plaintiff in response to the writ, and that the alternative judgment provided for can only be entered where the property held has been delivered to the plaintiff in response to the writ. That section does not authorize such an alternative judgment against the defendant as was entered here.

The court finds that the automobile in this case was held by the defendant for $125 rightfully due to the defendant for repairs made on the automobile, and the defendant had a lien thereon for that amount. In view of this finding plaintiff could not, we think, recover in replevin either for wrongful taking or detention without first paying or offering to pay this amount. The court cannot compel defendant to surrender the property in response to the replevin writ. Yoti v. People, 91 Ill. 11.

In any view of the case this judgment cannot stand, and the judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

25765

1544a

264 - 25765

LAURENCE QUINCEI,
Appellee,

vs.

ANNA KOSLICEK and ANNA KOSLICEK,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

220 I.A. 650[4]

MR. JUSTICE SANFORD DELIVERED THE OPINION OF THE COURT.

This is an attempted appeal from an interlocutory injunction issued by the trial court on August 6, 1919.

The record shows that an appeal bond was filed and approved by the clerk of the Superior Court on September 6, 1919, and that the transcript of the record was filed in this court on October 6, 1919, sixty-one days after the entry by the trial court of the order appealed from.

The jurisdiction of this court to review interlocutory orders or decrees of this sort is derived from section 193 of the Practice Act, Hurd's Revised Statutes, 1919, page 2108. By that section the right of appeal is given: "provided that such appeal is taken within thirty days from the entry of such interlocutory order or decree, and is perfected in said appellate court within sixty days from the entry of such order or decree." This clause of section 193 has been construed in McCarthy v. City of Chicago, 197 Ill. App., 564, and under the law as there announced, which we need not here repeat, this court is without jurisdiction to entertain the appeal, because it was not perfected within the time conditioned by the Statute.

It will, therefore, be dismissed.

APPEAL DISMISSED.

Barnes, P. J., and Gridley, J., concur.

S - 25391

VIRGINIA FORTIN,
Defendant in Error,

vs.

AURELIUS G. FORTIN,
Plaintiff in Error.

ERROR TO THE SUPERIOR COURT OF COOK COUNTY.

220 I.A. 651

MR. PRESIDING JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In an action for breach of promise to marry plaintiff had judgment on the verdict of a jury for $35[illegible], and defendant brings the record to this court for review.

Defendant argues for reversal that plaintiff can not recover special damages unless such are claimed by apt averment in the declaration, and that plaintiff is not entitled to recover punitive damages unless defendant has been guilty of fraud and deceit or has been actuated by evil motives.

Plaintiff contends that defendant promised to marry her and broke that promise; that in faith of such promise plaintiff took charge of a rooming house belonging to defendant in Chicago at his request and for about eight months rendered valuable service for him in the operation and management of the rooming house and also of a summer resort owned by him at South Haven, Michigan; that defendant made presents to plaintiff, during that time, of such nature as frequently pass from a man to his fiancee. Several witnesses gave testimony regarding defendant's promise to marry plaintiff.

We think there was an abundance of evidence from which the jury might reasonably find that defendant promised to marry plaintiff and that in faith of such promise plaintiff

rendered a valuable service to defendant without pay and in the belief that he would keep such promise. They might further find that defendant never intended matrimony with plaintiff, but made the promise of marriage for the purpose of acquiring plaintiff's service without pay, and that his actions in this regard were deceitful; that defendant's breach of his promise to marry put plaintiff in a rather compromising position and subjected her to the suspicion among her friends and acquaintances that her relations with defendant were not exactly ethical. There was also reliable proof that defendant was a man of some wealth and possessed of tangible property both real and personal.

We are not at liberty to disturb the judgment unless from the record we can say that it is contrary to the manifest weight of the proofs. This we are not able to do. The record contains abundant evidence to support the promise of marriage and its breach by defendant and that the financial status of defendant is ample to support the amount of damages assessed by the jury on the theory that plaintiff was entitled to punitive damages, which we think she was. In Jacoby v. Stark, 205 Ill. 34, the court said:

> "It is not essential that exemplary damages, arising out of improper motives in entering into the contract of making or in refusing to comply therewith should be specifically declared for in the declaration. Such damages may be recovered as part of the general damages if the evidence discloses a proper case for the infliction thereof." Yoshlman v. Kartz. 204 ibid 418.

In assessing damages for the breach of a contract to marry it is well settled as a legal principle that the jury may take into consideration all injury sustained by the plaintiff immediately resulting from a breach of such promise. Burnett v. Simpkins, 24 ibid 265.

All the instructions requested were given by the

court to the jury. The bill of exceptions does not disclose that objection to any of them was made at the time of the trial; but counsel argue that objections were made and that the trial judge refused to allow such fact to appear in the bill of exceptions. On this point it is sufficient to say that the bill of exceptions is patent with the court on review and that the insistance of counsel dehors the record is of no moment.

There is no reversible error in this record and the judgment of the Superior court is affirmed.

AFFIRMED.

Dever and McSurely, JJ., concur.

63 - 26186

JOHN KIENAN,
Defendant in Error,

vs.

THE CHARLES H. MURRAY CO.,
a corp., Plaintiff in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

220 I.A. 651[2]

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

In an action for personal injuries plaintiff had a verdict for $12,635, upon which judgment was entered and defendant appeals.

The action was trespass on the case according to the course of the common law. The common law record only is before us, and this presents for our consideration and determination the question whether the declaration states a cause of action sufficient to sustain the judgment after verdict. If the declaration states a common law cause of action the judgment must be sustained, but if it fails so to do the judgment must be reversed.

The cause proceeded to trial under the amended declaration consisting of two counts, to which defendant pleaded the general issue.

It appears from the averments of the amended declaration that plaintiff, a mason, on the 4th of September, 1916, was engaged in laying cement blocks in the building of a sale for defendant and in so doing used a scaffold erected by defendant for that purpose. After alleging the duty of defendant to erect and maintain such scaffold in a safe and proper manner so as to give adequate protection to the life and limb of plaintiffas well as

to its other employes engaged in said work, the declaration averred failure of defendant to perform such duty; that said scaffold was so carelessly and negligently constructed, contrary to a certain statute known as "An Act to provide for the protection and safety of persons in and about the repairing, construction or removal of buildings," etc., in force July 1, 1907, that by reason of such condition and while plaintiff was in the exercise of due care for his own safety and while working upon said scaffold the same gave way and plaintiff was then and there thrown off the same to and upon the cement bottom of said silo, a distance of 25 feet, and therefrom he suffered many injuries therein specified, etc., the ad damnum being laid at $20,000.

It is assigned for error and argued that a legal presumption arises from the averments of this declaration that plaintiff had accepted the terms of the Workmen's Compensation Act of 1911 and was bound thereby. To this contention we are unable to accord our assent, and we hold that this declaration states a cause of action according to the course of the common law.

While it may be that there are averments in the amended declaration which might have given plaintiff the right to seek compensation under the 1911 Workmen's Compensation Act, this did not change the action from common law to that of a statutory one. If defendant had desired to avail of the Workmen's Compensation Act as a defense it would have made that proof under its plea of the general issue, which would, if well taken, have been a complete bar to the common law action.

Sukas v. Appleton Mfg. Co., 279 Ill. 171, was a common law action in which the declaration did not negative the

operation of the Workmen's Compensation Act and did not allege that defendant had elected not to provide compensation under the act; and the Supreme court said that if defendant had elected to be bound by the Workmen's Compensation Act it would not be liable in a common law action for injuries to an employee. In the Supreme court defendant contended that inasmuch as the declaration had failed to negative the presumption that it was operating under the Workmen's Compensation Act it failed to state a case, thereby depriving the court of jurisdiction in the common law action; and the Supreme court said:

> "Whether the court had jurisdiction to determine defendant's liability to an injured employee in a common law action depended upon the fact whether defendant had elected not to be bound by the statute. Plaintiff offered to prove it had so elected, and defendant does not deny the truth of the fact offered to be proved and which was prevented from being made on its objection that it was not an issue in the case. If, in truth and in fact, it had made such election, then the court had jurisdiction to entertain a suit at common law to determine defendant's liability to an injured employe. We are warranted in inferring from the record that such was the fact."

In the instant case there is no evidence in the record to show what was the proof upon the trial.

Curran v. Wells Bros. Co. was an action at common law for personal injuries suffered by the plaintiff while in the employ of defendant. Defendant pleaded and contended that it was under the Workmen's Compensation Act. A recovery was had under a common law declaration and the judgment was affirmed both in this court and in the Supreme Court in 205 Ill. App. 307, and 241 Ill. 315. In both courts it was held that the burden was on defendant under a common law declaration to prove that it was under the Workmen's Compensation Act, and as defendant failed to prove that it had given notice to its employees, as directed by the act, that it was under the act, it had failed to establish such defense and the recovery in the common law action was without error.

In Robertson v. North Western Elevated R. Co., 210 Ill. App. 39, this court said in an opinion by Mr. Justice Thomson:

> "In view of the language which our Supreme Court has used in the decisions referred to, we hold that a declaration such as that involved in the case at bar sets up a good cause of action, although it makes no reference to the Workmen's Compensation Act and does not contain an allegation to the effect that the defendant has elected not to be bound by the act."

We therefore hold that the amended declaration found in the record stated a good cause of action at common law sufficient to sustain the judgment appealed from.

It is contended that this writ of error cannot be maintained by defendant because it is a foreign corporation, that its legal status is in the State of Ohio, and that it is not licensed to do business in Illinois; that under these circumstances it is not entitled to maintain a suit in this State and that the suing out of a writ of error is a new suit.

It would be anomalous indeed were it possible to bring a non-resident corporation into the jurisdiction of the state courts against its will, and then deprive it of the right of review of a judgment entered against it. In a strict sense, this is not a new suit; it is simply a review of the record in the original suit. Having compelled defendant to submit to the jurisdiction of the trial court, it will be accorded all the privileges granted to residents, including a review of the judgment rendered against it. The statute prohibiting a foreign corporation, which has not obtained from the Secretary of State a license to do business within this State, does not apply to corporations which have been summoned into court and made to defend against actions brought by others; and such a statute does not prevent such a corporation from obtaining a review and reversal of a judgment rendered against it in such an action. The action mentioned in the statute refers to an ordinary pro-

ceeding in a court of first instance, not to an appellate proceeding brought to correct errors of such court. Vol. 9, sec. 5970, Fletcher's Cyclopedia of the Law of Private Corporations.

In Swift v. Platte, 68 Kan. 1, the court said:

"It will be observed that the prohibition is directed at the bringing of actions, and not at the making of defenses to actions rightly brought. Platte brought the company into court and, having forced it into litigation, he is hardly in a position to say that it shall not contend with him to the end of the litigation. The action mentioned in the statute refers to an ordinary proceeding in a court of first instance and not to an appellate proceeding brought to correct the errors of such court. The proceeding in this court although in some respects distinct from the action in the trial court, and although the steps taken in the commencement of each are somewhat analogous, is purely appellate, and is, in a certain sense, a continuation of the controversy in the district court. Instead of there being a right of action in Swift v. Co., it is only a right of review; and, while the company institutes the proceeding here, it is still in an attitude of defense, and is resisting the claims and contentions of the plaintiff below. The jurisdiction of the court in such cases is limited to a review of the rulings of the district court, and in event of a reversal the case is remanded for a retrial. The commencement of such a proceeding cannot be regarded as the prosecution of an action, within the meaning of the statute, and the prohibition can never apply to the institution of a proceeding in error by one commenced into a trial court, and made to defend against an action brought by another."

For the foregoing reasons the judgment of the Circuit court is affirmed.

AFFIRMED.

Dever and McBurely, JJ., concur.

1547a

11% - 26484.

PEOPLE OF THE STATE OF ILLINOIS, Defendants in error, vs. I. JORDON, Plaintiff in error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The defendant was found guilty of disposing of mortgaged property consisting of an automobile while the mortgage remained unpaid and without procuring the consent of the mortgagee, with intent to cheat and defraud, and sentenced to six months imprisonment in the house of correction and to pay a fine of $300 and costs of the cause.

An examination of the record and the errors assigned thereon while not convincing of the innocence of defendant of the crime charged, impels us, however, to reverse the conviction for the sole reason that the People failed to prove the venue where the crime was committed as being within the jurisdiction of the Municipal Court, viz., the City of Chicago.

The ruling principle regarding proving the venue, as laid in an information or an indictment, may be stated to be that lacking statutory provision, the place of sale, or other disposition of personal property will determine the venue irrespective of where the mortgage was executed or where the property was brought from.

The only evidence regarding the sale of the automobile is that defendant sold the same to Mr. Seymour Bamberger "in Mandel Brothers store," and nothing further to show where such

store is situated. While that store is well known to many citizens of Chicago, the law will not permit us to take judicial notice of its situs. In Moore v. The People, 150 Ill. 408, the court refused to take judicial notice that "Upper Alton" was in the State of Illinois or in Madison County, saying that "For aught that appears there may be an Upper Alton in Iowa or Indiana, or some other State;" so by parity of reasoning we may say that there may be a Mandel Brothers' store in some place other than the City of Chicago.

In Dougherty v. The People, 118 Ill. 160, there was no evidence in the bill of exceptions as to the place where the crime was committed. It seems the witnesses referred to streets and localities by name without indicating further in what county or city those streets were, nor did the witnesses mention any fact or circumstance showing by necessary inference that such streets or localities were in the City of Chicago or elsewhere in Cook County, and the court said:

"True, there may be streets and localities of the same names in the City of Chicago, but so there also may be in other cities, and no rule of law requires us to judicially know that those referred to by the witnesses are in the City of Chicago, or elsewhere in Cook County. ***The principle is as well settled as is any other applicable to criminal trials, that where the record brought to this court on writ of error, in a criminal case, purports to contain all the evidence given on the trial below, it must appear affirmatively, from the evidence, that the offence charged was committed in the county alleged in the indictment, otherwise a judgment of conviction will be reversed."

The record in this case is certified as being complete;

consequently under decisions supra we have no alternative but to reverse the judgment of the Municipal Court, which is accordingly done.

REVERSED.

Dever and McSurely, JJ., concur.

6 - 15031

PEOPLE OF THE STATE OF ILLINOIS ex rel. HENRY L. GULLETT,
Defendant in Error,

vs.

CITY OF CHICAGO, a Municipal Corporation, WILLIAM HALE THOMPSON, as Mayor of the City of Chicago, CHARLES C. HEALEY, as General Superintendent of Police of the City of Chicago, HENRY B. COFFEE, JOSEPH P. GLEASY and CHARLES H. FRANCIS, as Civil Service Commissioners of the City of Chicago,
Plaintiffs in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

220 I.A. 651[4]

MR. JUSTICE DUFFY DELIVERED THE OPINION OF THE COURT.

A judgment was entered in the Circuit Court of Cook County awarding a writ of mandamus against defendants as prayed for in a petition filed on behalf of Henry L. Gullett, a former member of the police department of the City of Chicago. The petition was filed February 15, 1916, and it was alleged therein, *inter alia*, that Gullett, the relator, during the month of April, 1906, was appointed to the office of patrolman in the police department; that he was discharged therefrom for lack of appropriation to pay his salary; that he was reappointed to the same position on April 6, 1908, and that he entered upon his duties as patrolman and served as such until September 15, 1915, on which date he was granted a leave of absence by the superintendent of police for the term of one year; that at the time said leave was granted him the relator tendered his resignation in writing to take effect at the expiration of the leave of absence period.

It was further alleged in the petition that the petitioner on December 2, 1914, had received a letter from

the superintendent of police ordering the relator to report for duty in the police department on or before December 10, 1913; that relator was informed by said letter that on his failure to comply with this order charges would be filed with the civil service commission against him for disobedience of orders; that it was impossible for relator to comply with this order because of the fact that he had become obligated upon certain leases and contracts; that he so informed the superintendent of police who notified relator that charges would be preferred against him before the civil service commission and that relator, in order to prevent the filing of said charges, was obliged to and did tender his resignation to take effect January 11, 1914, which said resignation was accepted by the superintendent of police and was filed with the civil service commission; that thereafter the name of relator was dropped from the payroll of the police department and has been omitted therefrom ever since; that the conduct of the superintendent of police in compelling the resignation of relator, as alleged, was unjust and invalid, etc. A judgment was entered in favor of relator and respondents were directed to restore him to his former position in the police department. Respondents bring the case here by writ of error. No appearance has been filed here on behalf of relator.

It is our opinion that a demurrer filed to the petition should have been sustained. The petition is insufficient in several respects touching a failure to set out therein, either in substance or in hæc verba, ordinances which it is assumed would, if introduced in evidence, have shown relator's legal right to seek a remedy by writ of mandamus. We think further that the petition fails to show the legal existence of the office in question and a de jure right in the plaintiff thereto. Through

v. City of Chicago, 250 Ill. 551. Also there is merit in the position taken by respondents that material allegations of the petition are stated by way of conclusion; that facts are not alleged from which the right of the relator to the remedy sought may be assumed and that the conclusions of the pleader are not admitted by the demurrer. Stuhr v. City of Chicago, [illegible] Ill. 209; Mallory v. City of Chicago, 207 Ill. App. 390.

It will serve no useful purpose to set forth the allegations of the petition at greater length. But aside from what has been said the judgment of the Circuit Court must be reversed for the reason that the petition on its face shows that the relator was guilty of laches in bringing his action for restoration to the police department. The petition was filed on February 15, 1916, and his resignation was tendered on January 21, 1914, which resignation was accepted by the superintendent of police and thereafter approved on January [illegible], 1914, by the civil service commission. A period then of about two years had elapsed between the tender of the resignation and the bringing of the suit.

In the case of Kennally v. City of Chicago, 290 Ill. 485, it was held that a petition for mandamus should be dismissed where a delay amounting to laches is apparent from the face of the petition and is unexplained and that the question of laches can be raised on general demurrer. City of Chicago v. People ex rel. Gray, 210 Ill. 84.

Cases decided by the Supreme Court sustain the argument that a writ of mandamus not being a writ of right the court may refuse to grant the writ in cases where it appears that the granting of the writ will operate unjustly. People v. Olsen, 215 Ill. 620.

In the Kennally case, supra, Kennally was

appointed a policeman by the City of Chicago in 1888. His name was dropped from the police payroll March 14, 1893. He filed his original petition for mandamus on January 24, 1900, and an amended petition in 1904. It was held that Kennally had been guilty of laches in bringing his action.

In the case of Schultheis v. City of Chicago, 240 Ill. 170, the Supreme Court held that -

> "A member of the Chicago police force claiming to have been wrongfully removed would be barred by laches from his right to have the record of the civil service commissioners reviewed by certiorari if he delayed more than six months in beginning his suit unless the delay was satisfactorily explained by the petition for the writ. We are satisfied that we should adhere to the Kennally case."

In the case of McAlevy v. City of Chicago, 207 Ill. App. 350, it was held that a police patrolman was guilty of laches where it appeared that he had filed his petition for a writ of mandamus more than fifteen months after his name had been dropped from the payroll, and a demurrer to the petition having been filed within three days nothing had been done thereafter for a period of about twenty-seven months when an order setting aside a previous order of dismissal was entered in the cause.

The petition shows on its face that the relator was guilty of laches. The judgment of the Circuit court must therefore be reversed and the cause remanded to that court with directions to sustain the demurrer and to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

Holdom, P. J., and McSurely, J., concur.

26 - 26138

1549a

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,

vs.

NELLIE MEYER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

220 I.A. 651

MR. JUSTICE DWYER DELIVERED THE OPINION OF THE COURT.

It is urged on behalf of the defendant, Nellie Meyer, that the Municipal Court of Chicago erred in sentencing her to pay a fine of $100 on a complaint filed in that court.

It was charged in the complaint that the defendant did "wilfully encourage Emily Luptak, a female person under the age of eighteen years, to-wit, 16 years of age, to be or to become a delinquent child and did then and there unlawfully, knowingly and wilfully do acts which directly produced, promoted and contributed to conditions which tended to render said Emily Luptak to be or to become a delinquent child in that she, the said Nellie Meyer, induced and encouraged the said Emily Luptak to remain away from the house of her parents without the consent of said parents, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois."

It is said that the complaint is insufficient because it is charged therein that defendant induced and encouraged Emily Luptak to remain away from the house of her parents without the consent of said parents; that no charge was made that this conduct on the part of defendant was committed, as required by the statute, without just cause. We do not agree with the contention made.

The recitation in the complaint that the defendant had induced Emily Juptak to remain away from the house of her parents without their consent is to be regarded as surplusage. The offense with which the defendant was charged was that of unlawfully, knowingly and willfully doing acts which directly produced, promoted and contributed to conditions which tended to render said Emily Juptak a delinquent child. The information charges the offense in the language of the statute. The point was directly passed upon by this court in the case of People v. Wallace, 185 Ill. App., 413, 414, wherein it was held that an information substantially the same as the one in question was sufficient.

It is further urged that no proof was offered on the trial that Emily Juptak had parents or a home, or that she had been induced to remain away from her parents without their consent. We are unable to determine this question for the reason that the abstract of record filed in the cause fails to show that the evidence abstracted therein was all the evidence introduced on the trial. People v. Adams, 208 Ill. 539.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Holdom, P. J., and McSurely, J., concur.

1550a

44 - 30161

JOSEPH T. DALFONSO,
Defendant in Error,

vs.

THE CITY OF WEST PULLMAN,
Plaintiff in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

220 I.A. 652

MR. JUSTICE DUFFY DELIVERED THE OPINION OF THE COURT.

A judgment was entered in the Circuit Court of Cook County in favor of the plaintiff, Joseph T. Dalfonso, and against the defendant, City of West Pullman, for the sum of $15,400.52.

It is gathered from the brief filed by the defendant which brings the case to this court by writ of error that the suit was an action in assumpsit for money had and received. In defendant's brief it is stated that a jury verdict was returned in favor of the plaintiff on the 11th day of January, 1930, and that on the 20th day of January the plaintiff "filed four certain exhibits in the office of the Clerk of the Circuit Court." The only reasons assigned in the brief of counsel for defendant for a reversal of the judgment are, first, that,

> "The city is not liable out of its general fund to pay bonds issued in anticipation of the collection of special assessments, where the installment of the assessment for which the bond has been issued has been collected, but where the money thus collected has been illegally used by the city treasurer."

and, second, that:

> "The verdict and judgment should not have been in excess of the sum of $1,500."

Certain exhibits which apparently were introduced in

evidence in the cause appear in the record filed in this court, but this record contains no bill of exceptions.

Whether the judgment should be reversed for the reasons assigned could only be determined by an examination of all the evidence introduced upon the trial and in the absence of a transcript of this evidence we are unable to determine the questions presented. Further than this, the abstract of record filed in the cause gives us no information whatsoever as to what the suit is about, or what issues were presented in the trial court. Neither the declaration nor subsequent pleadings, if there were any filed in the cause, are shown in the abstract of record. In this state of the record we are compelled to affirm the judgment of the Circuit Court. Johnson v. Reed, 208 Ill. App. 135.

The judgment of the Circuit Court will be affirmed.

AFFIRMED.

Holdom, P. J., and McNurely, J., concur.

87 - 26186

Certiorari denied

JOSEPH DIXON CRUCIBLE COMPANY,
Appellant,

vs.

RYCON BRONZE COMPANY,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

220 I.A. 652

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago against the defendant to recover the sum of $1814.80. The case was tried by the court without a jury and judgment was entered in favor of defendant. Plaintiff appeals the case to this court.

An order for crucibles was contained in a letter mailed by defendant to plaintiff July 9, 1917. The plaintiff in acknowledging receipt of the order wrote the defendant in part as follows:

> "As you can appreciate we are being forced to prepare crucibles with American clays and while we are receiving some very satisfactory results we cannot guarantee service even though we are using the best material procurable."

This letter was followed by two circular letters, in one of which the defendant was told why the plaintiff could not guarantee the fitness of the crucibles for the service for which they were intended to be used, and defendant was again informed that plaintiff could only guarantee them to be made from the best material procurable. This letter told the defendant in unmistakable terms that because of war conditions which existed at the time (July 17, 1917) the plaintiff was unable to procure graphite from Ceylon or clay from Germany with which to manufacture the crucibles, and that plaintiff was required to rely altogether upon materials produced in America; that under the circumstances it would be impossible for the plaintiff to guarantee the quality

of the crucibles ordered. The evidence shows that the use of American materials in the manufacture of crucibles at the time the contract was entered into, was in an experimental stage and defendant was informed by the circular letter that plaintiff had made a great many experiments with these materials, some with favorable results. This letter concluded as follows:

> "Understanding you wish no delay to occur in the filling your order, we have taken the liberty of entering same for prompt shipment. If, however, you should desire, with the above information before you, to have shipment withheld, kindly telegraph us your advice to that effect immediately on receipt of this letter, and we will stop same."

The conditions attending crucible manufacture in America on July 17, 1917, seem to have been well known by officers of both plaintiff and defendant, and the evidence shows that from the beginning of the industry in this country the clay used in their manufacture had come from Germany. After the war began and after the stock of German clay had been exhausted in this country, American manufacturers were compelled to experiment with American materials, and at the time the contract was entered into both the plaintiff and the defendant were aware of conditions which rendered it unwise for the plaintiff to guarantee the quality and fitness of crucibles manufactured from American clay. The record shows that after certain deliveries of the crucibles had been made to the defendant the plaintiff in several letters called the defendant's attention to the fact that certain crucibles delivered had been so marked as to indicate to plaintiff the mixture used in their manufacture and defendant was requested to keep plaintiff informed as to the character of the service rendered by the different lots of crucibles so marked. No attention was paid to this request. It seems to be conceded that the only way to determine the quality of the crucibles was by their use. The crucibles were intended to be used by the defendant for the purpose of melting metals, and the evidence tends to show that

when certain of them were used for this purpose they cracked and the metal in them flowed into the furnaces. No complaint was made of the defective quality of crucibles shipped to defendant for about two years following their delivery, and defendant's president explains the delay by testifying that the defendant's plant had been shut down during most of this period, and that he, the witness, had been engaged in the metallurgical department of the United States Government.

It is our opinion that on the whole evidence the plaintiff is entitled to recover. This is not a case of implied warranty. Indeed, the evidence satisfactorily shows that plaintiff took every precaution to warn the defendant that it would not, because it could not, under the circumstances guarantee the quality of the crucibles ordered; and further, the defendant was directed if he wished to have the shipments of crucibles withheld, to "kindly telegraph us your advice to that effect immediately on receipt of this letter and we will stop same." Keeping in mind then the conditions which existed at the time the contract was entered into and the express understanding between the parties, it cannot be held that the defendant was imposed upon at the time its order was accepted or that the plaintiff had failed to use in the manufacture of the crucibles the best clay and other materials obtainable.

There is some evidence in the record of a telephone conversation in which somebody, not shown to be an agent of the plaintiff, was informed that the crucibles were defective. The evidence shows, however, that they were used to some extent by defendant during the year 1917 and again in the year 1920. We think the preponderance of the evidence shows no objection was made to the crucibles for more than two years after they were received and used by the defendant; that certain of the crucibles which were not used have never been returned to the plaintiff.

In the case of Fuchs & Lang Mfg. Co. v. Pittsburgh & Co. 146 Ill. App. 350, it is said:

> "Where an article is sold by a formal written contract, as we think is the case here, and the contract is silent on the subject of warranty, no warranty made at the same time or prior thereto can be shown since the writing is supposed to embody the entire contract; and for the same reason, no additional warranty can be engrafted on the contract as written. Seitz v. Brewers' Refrigerating Co., 141 U. S. 510; Telluride Power Co. v. Crane Co., 208 Ill. 218-227; Peoria Grape Sugar Co. v. Turney, 175 Ill. 631; Case Mfg. Works v. Miles & Scott Co., 83 N. W. 1013."

In the instant case no express warranty as to the quality of the crucibles was included in the contract and the evidence is clear that the plaintiff went to considerable lengths to impress upon the defendant the fact that if the crucibles were accepted by defendant it would be at its own risk.

The evidence shows that there is due the plaintiff under the contract the sum of $1812.00.

The judgment of the Municipal court will be reversed and a judgment entered here in favor of the plaintiff for the sum of $1812.00 with costs here and in the court below in favor of the plaintiff.

REVERSED AND JUDGMENT HERE.

Holdom, P. J., and McSurely, J., concur.

75 - 36236

NEW PROCESS REFINING COMPANY,
a corporation,
Appellant,

vs.

RUDOLPH R. ROSENBAUM,
Appellee.

) APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

220 I.A. 652[3]

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff seeks by this appeal to reverse an order of the superior court of Cook County sustaining a special demurrer to a declaration.

The case was before us on a former appeal. New Process Refining Co. v. Rosenbaum, No. 25055, opinion filed December 5, 1919. In the former appeal the question presented was as to the sufficiency of a general demurrer which was filed to the declaration and in deciding the case we held:

> "It may be quite true, as urged by counsel for defendant, that if we were permitted to read the contract it would disclose, as a matter of fact, that no warranty had been made by defendant as to the quality of the materials which were to be manufactured by the corporation under the instruction and supervision of the defendant, but the contract, which is merely attached to the declaration, is no part thereof. The suit in which plaintiff seeks to recover damages is a common law action and no citation of authorities is needed in support of the proposition that the right to recover in such an action must be found within the four corners of the declaration; that instruments attached thereto as exhibits or otherwise are no part thereof."

On the mandate of this court to the Superior court an order was entered overruling the general demurrer and the defendant was given time within which to plead. A special demurrer, filed by stipulation, was sustained. In our former opinion we held that the contract could not be made a part of the declaration by attaching to it a copy of the contract, and that consequently in determining the general demurrer we were

not permitted to examine the contract; that in other respects the first count of the declaration was sufficient. Notwithstanding our holding that the point relied upon in the former appeal for reversal of the judgment could not be availed of under a general demurrer a special demurrer to the declaration was filed by stipulation of the parties.

It is contended that the special demurrer came too late in that it followed the general demurrer which was overruled. The point cannot aid the plaintiff for two reasons; first, the parties stipulated that the special demurrer might be filed, and, second, the point is made for the first time in this court in plaintiff's reply brief. Counsel correctly state that they did not stipulate that the special demurrer "was good"; they did, however, stipulate that an order might be entered giving the defendant leave to file a special demurrer and the trial court was thereby given the power to determine whether the declaration was obnoxious to this demurrer. It is further argued that the questions presented by the special demurrer were determined on the former appeal. We do not think so. In our opinion we passed upon a general demurrer which raised only questions of substance which did not go to the form of the declaration. The record of the present appeal shows that a special demurrer was filed which the trial Judge held good. No bill of exceptions is included in the record on the present appeal. If the plaintiff desired to have us pass upon the sufficiency of the special demurrer or the action of the trial court thereon, it was incumbent upon it to include a bill of exceptions in the record showing what was before the trial court upon which its action was based. Without this we must presume the propriety of its ruling.

In the case of Thompson v. Kimball, 30 Ill. App. 442, it was held that exhibits are no part of the pleadings in actions

at law, and in deciding the case the court said:

> "Whether there was a copy attached to or filed with the declaration cannot be told here without a bill of exceptions as such copy is 'no part of the record'."

Straton v. Henderson, 26 Ill. 68.

Exhibits are not part of the pleadings at law. Hart v. Tolman, 1 Gil. 1.

Keeping in mind the fact that we are permitted to examine only what is properly a part of the record before us, and that no bill of exceptions is included therein, we must assume that the action of the trial court was not erroneous, and we are compelled to enter an order of affirmance.

The order of the Superior court will be affirmed.

AFFIRMED.

Holdom, P. J., and McSurely, J., concur.

83 - 26236

STEVE SIMAN, Defendant in Error,

vs.

SAM MARSHALL, Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court in favor of the plaintiff for the sum of $100.

The suit was brought to recover for legal services rendered the defendant by plaintiff from April to September, 1910. The claim for services is based upon several items.

We have examined the testimony given by plaintiff and by defendant and we are unable to say that the judgment of the trial court is not supported by the evidence. There is evidence which tends to show that the plaintiff performed legal services in four suits in which the defendant was a party and had also rendered other legal services for the defendant. The main question presented is that the evidence is not sufficient to sustain the judgment, and on this question we think that the court was not in error when it found the issues of fact in favor of the plaintiff. It is insisted that the form of judgment entered is not intelligible; we think otherwise. As set out in plaintiff's brief, the form used is readily understandable. The judgment as abstracted appears to be in the usual and proper form.

The case was tried before a jury which rendered a verdict in favor of the plaintiff for the amount of the

judgment and the abstract shows that a motion for a new trial and a motion in arrest of judgment were overruled and judgment was entered against the defendant for the amount of the verdict.

The judgment appears to be correct and will be affirmed.

AFFIRMED.

Holden, P. J., and McCurdy, J., concur.

107 - 26273

THOMAS SARANTOPOULOS,
trading as SARANTOPOULOS BROS.,
Appellant,

vs.

NATHAN GINSBURG,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

220 I.A. 652

MR. JUSTICE BRIEN DELIVERED THE OPINION OF THE COURT.

In a statement of claim filed in the Municipal court of Chicago the plaintiff charged that the defendant was indebted to him in the sum of $809.02 for damages caused by a failure on the part of defendant to deliver a carload of potatoes to plaintiff which it is alleged the defendant, under the terms of a contract, was required to deliver to plaintiff at Chicago, within a reasonable time after April 1, 1940, at a price of $5.80 per cwt. f. o. b. Antigo, Wisconsin. A judgment was entered in favor of the defendant, which the plaintiff seeks to reverse by appeal to this court.

The plaintiff insists that the defendant agreed to deliver the potatoes to plaintiff at Chicago subject to a right of inspection.

In the making of the contract the defendant was represented by a Mr. Rose. The carload of potatoes in question was shipped at Antigo, Wisconsin, consigned by the defendant to himself as consignee at Chicago and was delivered to the carrier with instructions to notify the plaintiff on its arrival in Chicago. On April 2, 1940, the defendant attached a bill of lading for the potatoes to a draft drawn on the plaintiff for the sum of $2366.10, and there is evidence in the record to the effect that a messenger for the Continental and Commercial National Bank of Chicago presented the draft for payment to the pl-

April 5, 1940. The testimony of the messenger does not directly prove that the bill of lading was attached to the draft, but in view of what is hereinafter said we do not think it necessary to determine whether the bill of lading or draft had ever been presented to the plaintiff. It is shown by the evidence that at the time the draft is said to have been presented to the plaintiff the car of potatoes had not arrived in Chicago, and the messenger testified that the person to whom the draft was presented had asked him to hold the draft for the arrival of the car. The car arrived in Chicago April 7, 1940. The record shows that one Skallerup obtained the bill of lading from the Continental and Commercial National Bank and thereafter, on April 7, 1940, sold the potatoes to Mildahl Bros. On April 7, 1940, the potatoes in the Chicago market were worth from $7.50 to $7.75 per cwt. The contract price for the potatoes at Antigo, Wisconsin, was $5.50 per cwt. Skallerup acted for the defendant in the transaction.

The contract for the sale of the potatoes to the plaintiff was in the first instance made orally with the defendant's agent. This contract was, however, ratified by a letter received by the agent from the defendant on April 1, 1940, and also by telegrams and another letter between defendant and his agent. There is no merit in the contention that the potatoes were to be delivered to plaintiff at Antigo, Wisconsin. Mr. Rose testified: "I sold this car of potatoes to Karantzoulas at $5.50 cwt. f. o. b. price point of origin, delivery and right of inspection at Chicago." This witness further testified that the car of potatoes arrived at Chicago on April 7, 1940, and was sold to Mildahl Bros.

Plaintiff's testimony shows that he went to the tracks of the Chicago and Northwestern Railway Company in Chicago on April 7, 1940; that the carload of potatoes was on the tracks at the time, but that the railroad company's agent refused to permit him to inspect them.

The evidence shows without such question that plaintiff had no reasonable opportunity to inspect the potatoes after their delivery on the tracks at Chicago. Even if it be conceded that the bill of lading and draft drawn on plaintiff for the payment of the potatoes had been presented to him, plaintiff was not required to accept the bill of lading and pay the draft before he had a reasonable opportunity to inspect the potatoes. There seems to be no denial in the record that the potatoes had not reached Chicago at the time the bill of lading and draft are said to have been presented to the plaintif. The evidence shows that on April 7, 1920, he attempted to inspect the potatoes which at that time had arrived in Chicago and his request was refused by the railway company for the sole reason that they had been sold to Hildahl Bros.

There had been a material rise in the price of potatoes between the time of the making of the contract and the delivery of the car on the tracks at Chicago on April 7, 1920, and under the circumstances it does not seem reasonable that the plaintiff would refuse to perform his part of the contract.

The evidence does show that on the return of the bill of lading and draft to the Continental and Commercial National Bank the defendant, through his agent, promptly sold the potatoes to Hildahl Bros. The contract for the sale of the potatoes required the defendant to deliver them to the plaintiff at Chicago and by custom, as well as by express agreement, plaintiff was not required to accept them until he had a reasonable opportunity of inspection.

Section 47 of the Uniform Sales Act (chapter 121-a, Ill. Statutes) provides that -

> "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless, and until, he has a reasonable opportunity of examining them for the purpose of ascertaining whether they

are in conformity with the contract.

Unless otherwise agreed when the seller tenders delivery of goods to the buyer, he is bound on request to offer the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."

The evidence shows that, aside from the statutes, the plaintiff by the terms of the contract had a right to inspect the potatoes before he was required to pay for them. Barker v. Turnbull, 51 Ill. App. 226; Guggenheim v. Leffman, 148 Ill. App. 289.

As stated, the contract required the delivery of the potatoes to plaintiff at Chicago and he is entitled to recover of defendant the difference between the price named in the contract and their market price at Chicago, the place of delivery, on April 7, 1920, on which date the defendant breached the contract by selling and delivering the potatoes to Kildahl Bros. S. L. C. Co. v. Pogorey, 84 Ill. App. 144. Plaintiff is entitled to recover of defendant the difference between $5.80 per cwt., the contract price, and $7.50, the market value of the potatoes on April 7, 1920. The carload of potatoes weighed 40,450 pounds. A judgment should be entered in plaintiff's favor for $687.65.

It is our opinion that sufficient written memoranda of the contract in question appears in the evidence. The defendant personally signed the letter of April 1, 1920, in which he accepted an order for the potatoes sent him by his agent, and informed the agent that the goods purchased had been shipped. A telegram dated April 1, 1920, signed by the agent, and a letter signed by him and mailed to the defendant show the terms of the contract entered into between the parties. Sufficient evidence in the form of written memoranda appears in the record to charge the defendant under the contract. Further than this, the evidence

shows that the defendant shipped the potatoes to Chicago with written instructions to the carrier to notify plaintiff when they arrived at their destination.

The judgment of the Municipal court will be reversed and a judgment entered here in favor of the plaintiff for the sum of $687.65.

REVERSED AND JUDGMENT HERE.

Holdom, P. J., and McSurely, J., concur.

67 - 26190

JOHN THOMAS NEWMAN,
Plaintiff in Error,

vs.

LAWRENCE ICE CREAM COMPANY,
a corporation,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

220 I.A. 653

MR. JUSTICE McCUNLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiff seeks the reversal of a judgment of nil capiat entered upon an instructed verdict.

While riding as a passenger in an automobile plaintiff was injured in a collision with a motor truck belonging to defendant. He brought suit, alleging that the accident happened because of the negligent operation of the truck. Defendant pleaded the general issue and by a special plea denied the management, operation and control of the truck at the time of the accident. It was conceded that the defendant owned the truck and that its driver was one of its employes. The main question upon the trial was whether the driver was at the time of the accident engaged in the business of his master, the defendant, or upon a private, personal errand of his own. In addition to the conceded ownership and employment there was evidence tending to show that at the time of the accident the truck was loaded with tin cans belonging to defendant and used in and about its business. Defendant produced the testimony of the driver and one or two of his friends tending to show that the accident happened after the working hours of the driver and while he was using the truck at his own instance for a personal matter not connected with his employment by defendant. At the conclusion of the case, upon motion, the court peremptorily in-

structed the jury to find for defendant, which was accordingly done and judgment so entered.

We hold that the evidence presented a question of fact as to the operation of the truck which should have been left to the jury. While it is true that what is called the "scintilla rule of evidence" is not in force in this state, yet where reasonable minds might reach different conclusions the evidence must be submitted to the jury. Offutt v. Columbian Exposition, 175 Ill. 472. The evidence for plaintiff made out a prima facie case. Schweinfurth v. Dever, 91 Ill. App. 319. The credibility of the witnesses should be determined by the jury and, as was said in Anderson v. Nilsengren, 53 N. E. Rep. 119, quoted with approval in Jedelski v. Stone, 186 Ill. 540:

> "But a witness may be contradicted by the facts he states as completely as by direct adverse testimony. A court or jury is not bound to accept it as true merely because there is no direct testimony contradicting it, where it contains such inherent improbabilities or contradictions which alone, or in connection with other circumstances in evidence, satisfy them of its falsity."

A trial court is not justified in instructing a jury to find for either party on the ground that any other finding would be contrary to the greater weight of the evidence.

For the reasons above stated the judgment of the Superior court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Holdom, P. J., and Dever, J., concur.

93 - 26259

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

GEORGE E. DAVIDSON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

220 I.A. 659

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By Information filed Annie A. Davidson charged that George E. Davidson, the defendant, being her lawful husband, did on June 1, 1919, without reasonable cause, neglect and refuse to maintain and provide for his wife, she then being destitute, etc. Upon trial a jury returned a verdict finding defendant guilty and judgment was entered upon the verdict directing him to pay for the support of his wife. Defendant seeks a reversal.

It is said that the venue was not proved, and the record shows that the point is well taken. No witness testified as to where the occurrence complained of took place. It is not necessary that someone swear that the particular act took place in a particular city, county or state, but venue may be proved by circumstances. People v. Allegretti, 291 Ill. 364. In the instant case there was no testimony as to circumstances proving the place where the offense was committed. Neither the testimony of a physician, who had formerly operated on the complaining witness, that he practiced in the city of Chicago, nor that of the defendant's father that he (the father) worked for the "South Park Commission" is sufficient to prove the venue of the offense charged in the Information.

See People v. Jordon, No. 26284, opinion filed by us this day, and cases therein cited.

For the failure to prove venue the judgment must be reversed.

REVERSED.

Holdom, P. J., and Dever, J., concur.

130 - 36039

/2-1-26

C. B. SHAW COMPANY, a corporation,
Complainant,

PEOPLE OF THE STATE OF ILLINOIS,

vs.

RAINCOAT MAKERS' UNION, etc., et al.
In the Matter of the Contempt of E. Finsberg,
Plaintiff in Error.

WRIT OF ERROR TO SUPERIOR COURT OF COOK COUNTY.

220 I.A. 653

MR. JUSTICE MORTIMER DELIVERED THE OPINION OF THE COURT.

By this writ of error E. Finsberg seeks to have reversed a judgment finding him guilty of contempt of court in disobeying an injunctional order secured by C. B. Shaw Company, complainant.

The injunction prohibited persons "from in any manner unlawfully interfering with, hindering, obstructing or stopping the business of the complainants, or of their respective agents, servants or employes in the operation of the business of the complainant," and also "from assaulting or intimidating by threats or otherwise the employes of the complainant, or any persons who may become or seek to become employes of the complainant." It was also forbidden to hinder or interfere with or obstruct the business of the employes or of the complainant and from following the employes to their homes or other places for the purpose of molesting or intimidating them. After hearing the court found that a strike had been called upon the business of the complainant, C. B. Shaw Company, and that Finsberg was one of the employes; that he was advised of the injunctional order but wilfully, maliciously and unlawfully called at the place of business of one

Morris Bernstein, who was working for C. H. Shaw Company, and wilfully assaulted, attacked and beat said Bernstein for the purpose of intimidating him and other employes of the complainant with the view to obstructing its business; that on another occasion said Finsberg addressed some girls employed by the complainant with threats to "let them go tonight and get them some other night," for the purpose of compelling them by intimidation to refuse to perform their duties as the employes of the complainant; that also on another occasion he stopped Nicole Watkins and another employe of complainant as they were entering the place of business of the complainant and addressed them for the purpose of inducing and compelling them to refuse and fail to do their work for the complainant. The court held that the assault on Bernstein and these other acts were in wilful violation of the injunction and Finsberg was therefore found guilty of contempt and sentenced to jail for forty days and fined two hundred and fifty dollars.

It is asserted by plaintiff in error that there is not a sufficient quantum of evidence to prove his guilt beyond a reasonable doubt. This is not necessary. This is a proceeding for the punishment of a civil contempt and in the pleadings, character and quantity of proof required conforms to the rules and practice applicable to other chancery proceedings. Rothschild & Co. v. Steuer & Bros. Clean Mfg. Co., 356 Ill. 196; The State Public Utilities Commission v. The City of Duluth, 353 Ill. 443; O'Brien v. Int. L. O. Workers' Union, 234 Ill. App. 60.

It is urged it does not clearly appear that the acts of Finsberg were with an intent to disobey the injunctional order. Bernstein's testimony clearly tends to show that Finsberg assaulted him because he, Bernstein, continued to do work for complainant.

Fineberg admits that he struck Bernstein but claims that it was in self-defense. The Chancellor heard and saw the witnesses and was thus better qualified than are we to determine the credibility of their testimony. We cannot say it was error to accept Bernstein's version of the matter. This applies to the other occurrences. The record does not justify any reversal of the Chancellor's conclusion upon the facts. Under these circumstances the judgment should be affirmed.

AFFIRMED.

Holden, P. J., and Dever, J., concur.

26721

(1558a)

JACOB CLARKSKIE,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS ex rel. FIRST NATIONAL BANK OF HAMMOND, INDIANA,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

220 I.A. 653[4]

OPINION PER CURIAM.

February 28, 1920, appellant was adjudged by the Circuit court to be guilty of a contempt of its order of January 2, 1920, in failing to pay over certain moneys as directed by said order to his successor in office as treasurer of the City of West Hammond, Illinois, and for such contempt was committed to the common jail of Cook County, there to remain until he complies with said order, or until he shall have been released by due process of law. From this order appellant prayed and was allowed an appeal to this court, which he perfected by filing the necessary appeal bond which was approved by the Circuit court.

Appellant has failed to bring the record to this court to its present term, to which term the appeal was prayed.

Appellee brings the case here by filing a short record and therefrom moves an affirmance of the contempt writ. An examination of the record discloses that the court had jurisdiction of appellant and of the subject matter of such contempt and that all of the parties were heard and that the order appealed from was made upon due consideration of all the matters and things averred in the pleadings of the parties.

The original cause was before this court on a writ of error by appellant after the abandonment of an appeal by

him, and decided adversely to his contentions in case general number 25049, not yet reported, which decision was subsequently affirmed on certiorari by the supreme court in 395 Ill. 11.

In accord with our holding in City of Chicago v. Dalmitsky, 210 Ill. App. 159, the motion is allowed and the order of the Circuit court appealed from is affirmed.

MOTION ALLOWED AND ORDER AFFIRMED.

17 - 25439

CHARLES H. BACHMAN COMPANY,
a corporation,
Defendant in Error,

vs.

ROBERT M. BRANDON, H. M. EVANS
and JAMES BARRON,
Plaintiffs in Error.

ERROR TO CHANCERY COURT,
COOK COUNTY.

220 I.A. 653

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This writ of error brings for review a judgment entered in an action of assumpsit brought against five defendants as makers of a promissory note.

Judgment by default was entered against all of them. Later, on the ground that the court acquired no jurisdiction over two of them, the judgment was set aside and dismissed as to them at plaintiffs' costs, but the judgment against their motion to vacate was permitted to stand against the other three defendants, including plaintiffs in error.

The court erred in not vacating the judgment as to all the defendants. The doctrine is two well established to call for citation of authorities that a judgment against two or more defendants is an entirety, and must stand or fall as to all. (Claflin v. Dumas, 179 Ill. 241; Street R. R. Co. v. Morrison, 160 id. 280.) The judgment, therefore, could not stand as to the three defendants after it had been vacated and the action had been dismissed as to the other two. The declaration was predicated on the joint liability of the five. When two of them were dismissed out of the case, plaintiff could not proceed against more than one and less than all of the defendants. It is a familiar doctrine that on a joint and several obligation executed by more than two persons,

one or all of the surviving obligors may be sued but not an intermediate number. (Haestner v. First National Bank, 170 id. 322; Cummings v. People, 50 id. 132.) Had plaintiff not dismissed as to the two defendants over whom the court had acquired no jurisdiction, - they never having been served with process and their appearance not having been entered with authority - but had sued out a summons against them, in the nature of a scire facias, as provided in sec. 14 of the Practice Act, some of the authorities relied on by appellee to sustain the judgment would be applicable. But that is not the state of the record before us.

In Wilts v. Springer, 236 Ill. 276, cited by appellee, the suit was dismissed as to two defendants after verdict and judgment was entered thereon against the only other defendant and upheld. While that was an action in tort, yet the course pursued would have been proper in an assumpsit case because plaintiff proceeded against only one and not an intermediate number of parties deemed liable.

Accordingly the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Hatchett, JJ., concur.

447 - 25708

JOHN A. TODD,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a personal injury action. It was plaintiff's contention that shortly after he entered one of defendant's street cars, and while standing or walking near the front of the vestibule of the car, it was so negligently operated that it struck and swerved on to a temporary switch track leading to the parallel track, with such suddenness and force that in the lurch plaintiff put up his hand to protect himself from falling and it went through the glass in the vestibule door, causing the injury complained of.

Defendant contended that plaintiff entered the car with some rollicking companions, and that while he was opposite the vestibule door one of his companions tickled or playfully "jabbed" him, causing him to jump suddenly into the glass in the door, and that at that time the car was not entering or crossing any switch.

The arguments on this appeal are devoted mainly to questions of fact, appellant contending that the verdict is against the manifest weight of the evidence, reviewing it with much detail and needless repetition. Special emphasis is laid on the contradictory versions of witnesses, not only as to where the car was when the accident happened, but as to the occurrences inside of it.

We have carefully examined appellant's contention as to the weight of the evidence, and having reached the conclusion that there was sufficient evidence on which to base the verdict, if the jury gave it credence, it will serve no valuable purpose to review the same in this opinion.

There were about the same number of witnesses on each side, and while the testimony of one witness is not reconcilable in all its parts with versions and descriptions of places and circumstances given by another or other witnesses testifying on the same side or as to the same matter, yet the nature of the facts are such that perfect harmony would hardly be expected, but on the contrary it might be expected that the impressions or recollections of the witnesses with respect to minor details would vary even in material particulars. In such a case, where there is not inherent improbability of the testimony given, or indications in the record of manifest misrepresentation or purpose to falsify, and the determination of the controverted facts depends much upon the credibility of the witnesses and their demeanor and conduct on the witness stand, as observed by the jury, it has frequently been said that they occupy a superior position for determining the ultimate facts. Taking this fact into consideration and weighing the evidence as presented and argued, as it is our duty to do, we find no justification in disturbing the verdict, especially in view of the further fact that three juries have reached the same conclusion in this case, and also the fact that when this case was here once before on rebiew we reached and expressed the same disinclination on substantially like testimony to regard the verdict as manifestly against the weight of the evidence.

We do not ignore appellant's contention as to the general proposition that negligence will not be ordinarily

predicated on the mere lurching of a street car which may be incidental to its movement when operated with ordinary care. But in the case at bar it appears that the switch in question was of a temporary character to enable the cars, on account of repairing of tracks then going on, to switch over to the parallel track. Owing to the character of the switch, of which the motorman was apprised, and the speed of the car at 8 to 10 miles an hour when it struck the switch, according to the testimony of several witnesses, we are unable to say that it was not negligence under such circumstances to operate the car at such speed when reaching and passing on the temporary switch. While sitting as a jury we might not reach the same conclusion in the first instance as that reached by the jury in this case, yet not being able to say that the verdict is manifestly against the weight of the evidence the judgment will be affirmed.

AFFIRMED.

Gridley and Matchett, JJ., concur.

39 - 25801

ANTON CERMAK, Bailiff of the Municipal Court of Chicago, for use of GEORGE K. SPOOR, Plaintiff in Error,

vs.

RUDOLPH WURLITZER COMPANY, a corporation, and UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation, Defendants in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

220 I.A. 654

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit on a replevin bond, the replevin suit having been dismissed without a trial on its merits. The defense interposed is that the defendant, Rudolph Wurlitzer Company, (plaintiff in the replevin suit) had the right to possession of the property replevied by virtue of a chattel mortgage thereon, and judgment was rendered in its favor. The only question involved is whether the acknowledgment of the mortgage by an attorney in fact was valid. If so the judgment appealed from is concededly right.

The power of attorney given by the mortgagor was in the form prescribed by statute, (Section 2, Chap. 95, Hurd's R. S. 1919) and authorized the attorney in fact to appear before "Frank P. Danisch, justice of the peace," for the purpose of acknowledging the execution of the mortgage. The acknowledgment was made by said attorney in fact before "Frank P. Danisch, clerk of the Municipal Court of Chicago." Because his official title was not correctly designated in the power of attorney it is contended that the acknowledgment before him as clerk of said court was not in accordance with the power conferred and that therefore the mortgage was invalid as to one not a party or

This is a suit on a mortgage note, the mortgage note having been signed eighty years after the notes. The defense interposed is that the defendant, Lucile Williams Cooney, minority in the mortgage suit had the right to prosecution of the property mortgaged. By virtue of a minor's mortgage contract, and judgment was rendered in the favor. The only question involved is whether the acknowledgment of the mortgage by an attorney in fact was valid. If so the judgment appealed from is inevitably right.

The power of attorney given by the mortgagor was in the form prescribed by statute, (section 1, Chap. 79, Laws's 1. c. 1919) and authorized the attorney in fact to "cause before Joseph I. Lowenstein, justice of the peace," for the purpose of acknowledging the execution of the mortgage. The acknowledgment was made by said attorney in fact before Joseph I. Lowenstein, justice of the Municipal Court of Chicago." Because the official title was not correctly indicated in the power of attorney it is contended that the acknowledgment before him as clerk of said court was not in accordance with the power conferred and that therefore the mortgage was invalid as to her, - being an

privy to it, as is the case with the beneficiary plaintiff.

The statute provides: "The instrument authorizing such acknowledgment shall be substantially in the following form." In the form set forth is a space containing this direction in brackets: "Give the name of the officer and official title before whom the acknowledgment is to be made."

Appellant urges that the statute is mandatory and invokes the rule for strict construction of both the statute and power of attorney.

The mortgagor was a resident of the City of Chicago. The provision of said statute required him, either personally or by attorney in fact, to make acknowledgment "before the clerk or any deputy clerk of the Municipal Court in the district in which said mortgagor resides." Danisch was the clerk of said court. The office of justice of the peace of the City of Chicago had been abolished, and, therefore, he was not a justice of the peace. But whatever official title, therefore, Danisch was designated he, or one of his deputies, who usually take the same in his name, (Woodward v. Donovan, 167 Ill. App., 503; Albert Pick & Co. v. Spoor, 212 Ill. App., 612) was the only person before whom the acknowledgment could be taken. Hence, under such circumstances, peculiar to Chicago, we think the acknowledgment was substantially in compliance with the power conferred, and the requirements of the statute. No party could possibly have been misled or injured thereby, and we think it would be a misapplication of the rule of strict construction, and "sticking too close to the bark," to decide otherwise under these circumstances.

AFFIRMED.

Gridley and Matchett, JJ., concur.

52 - 25817

THOMAS F. ANDERSON,
Defendant in Error,

vs.

MORRIS KIDERHOFF and H. F. MORRIS,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

320 I.A. 654

MR. PRESIDING JUSTICE BAUMAN
DELIVERED THE OPINION OF THE COURT.

There are only two grounds presented for reversal of the judgment under review. One is that the judgment was entered against only one of two defendants jointly charged with liability on the check sued on. As plaintiff in error alone was served with summons it was proper to proceed against him without first obtaining service on the other defendant. (Sec. 14 of the Practice Act.)

The other is, that the statement of claim is insufficient because of failure to allege execution and delivery of the check sued on to the payee named therein, that the check was endorsed and delivered to the plaintiff, and any damages sustained or a prayer for judgment.

It alleges that the defendants are indebted to plaintiff on a check, purchased by him for a valuable consideration without notice of any defenses within a reasonable time after it was issued, on which payment was stopped. It also sets out the check verbatim, showing plaintiff in error to be the maker and the other defendant the payee and endorser, also the notice of presentment and protest. Bearing in mind that the cause of action need not be set forth in a statement of claim with the particularity re-

quired in common law pleading we think the statement of claim sets forth the elements of the cause of action with sufficient certainty and clearness to enable defendants to understand its nature and to make any legal defense they had thereto. Besides, the omissions of fact complained of, even if they were not such as would be cured by verdict, were nevertheless supplied by admission of such facts in the affidavit of merits, and the defense was predicated on the existence of such facts and others, and presumably evidence was heard on the issues so formed. In such a case the court will not reverse merely to correct the pleadings. (Kanter v. Lyons, 285 Ill. 336.) Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley and Matchett, JJ., concur.

85 - 25855

COMMERCIAL SASH & DOOR COMPANY, a corporation,
Plaintiff in Error,

vs.

W. S. HOLABIRD, Jr.,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

220 I.A. 654

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The judgment under review was for defendant. The case comes before us on a certified statement of facts, on which plaintiff in error, who was plaintiff below, claims the judgment and finding of the court should have been in his favor for $43.

Briefly stated the essential facts certified to are as follows: Defendant's agent asked plaintiff for a price on 100 oak counter tops of two different dimensions. The price given was $4.80 each for the longer tops, and $1.80 for the shorter. Defendant ordered only two of the long, and ten of the short tops, at the aggregate price of $27.60. They were delivered and paid for. Nothing appears to have been said about any further orders. About two months later defendant made a telephone request for 15 more of each kind. Plaintiff required a written order, which was given specifying the kinds but making no mention of price. Plaintiff filled the order the following month and charged $143. therefor.

Correspondence ensued between the parties, in which defendant claimed the charge was higher than he could get the goods for elsewhere. His position in the matter is fairly

stated in one of his letters in which he said: "If any change in price had been contemplated I should have been notified * * If lumber had advanced to such an extent that you could not fill the order at the price I was led to believe they would cost me, you should have notified me immediately." He paid $100 on account and declined to pay the balance of $43 claimed and sued for.

The inference to be drawn from the certified facts is that there was no agreement either on plaintiff's part to supply, or defendant's part to accept, any additional tops after filling the first order, and that the second order was made without any agreement as to the price of the goods ordered and delivered. It appears that the price charged for the goods furnished under the second order was the usual, customary and reasonable price prevailing when the order therefor was given and accepted. Consequently, in the absence of any proof of an agreement as to the price for the second order, the court should have found in accordance with the undisputed fact as to the value of the goods furnished, and rendered judgment for $43 for plaintiff. Accordingly the judgment below will be reversed and a judgment entered here for that sum.

REVERSED AND JUDGMENT HERE
FOR $43 AND COSTS.

Gridley and Matchett, JJ., concur.

85 - 25855

FINDING OF FACTS.

We find that defendant in error, W. S. Holabird, Jr., ordered and received from plaintiff in error, Commercial Sash & Door Company, a corporation, 26 oak counter tops without any agreement as to the price therefor, and that the usual, customary and reasonable price therefor was $143 of which a balance of $43 sued for remains due and unpaid.

341 - 26515

KAROLINA GUZY, Appellee, vs. CITY OF CHICAGO, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee having remitted the sum of $500 from the amount of a verdict and judgment in her favor for $4,500, and appellant having waived all errors assigned, except as to the excessiveness of the judgment, and agreed that the judgment shall be affirmed as to the balance, namely $4,000, the judgment for that sum will accordingly be affirmed.

AFFIRMED ON REMITTITUR OF $500.

Gridley and Matchett, JJ., concur.

28703

JOHN HAYNER,
Appellee,

vs.

JAMES H. HOUPT,
Appellant.

INTERLOCUTORY
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

220 I.A. 655

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

This appeal is from an interlocutory order denying a motion to dissolve a temporary injunction issued in the case. Appellant relies solely on the technical ground that the verification of the bill was defective in omitting therefrom the words "to be". Meeting technicality with technicality appellee calls attention to the fact that the injunction is not abstracted, and invokes enforcement of the rule that where the abstract is such that the court has to go to the record to reverse, it will not do so. Such is the rule and it should be observed, especially when reversal is sought on a pure technicality and not the merits of the controversy. Accordingly the order will be affirmed.

AFFIRMED.

Gridley and Hatchett, JJ., concur.

(1566a)

13 - 35289

JAMES H. MOORE,
Plaintiff in error,

vs.

WILLIAM HOWKIN and WILLIAM A. BURMEISTER,
Defendants in error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

220 I.A. 655

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff by this writ of error seeks to reverse a judgment rendered against him for costs by the Municipal Court of Chicago in a fourth class case in contract, tried before the court without a jury.

In the transcript of the record there is contained plaintiff's statement of claim, defendants' affidavit of merits, the court's finding, the judgment order, and the so-called "statement of facts", as amended by incorporating therein the rules of the Municipal Court in force at the time of the trial.

In plaintiff's statement of claim it is alleged that from May 25, 1910, to January 27, 1919, plaintiff was the owner in fee simple of premises, 4603 Monticello avenue, Chicago; that on September 27, 1912, the defendant, William A. Burmeister, without plaintiff's consent, took possession of one flat in said premises and installed the defendant, William Hofkin, therein, and the latter occupied said flat until January 27, 1919; and that the use and occupation of said flat for said period was reasonably worth $130, which sum has not been paid to plaintiff.

The defendants, in their affidavit of merits, denied that plaintiff, from May 25, 1910 to January 27, 1919, was the owner in fee simple of said premises, 4603 Monticello

avenue, and further denied that said Burmeister without plaintiff's consent took possession on September 27, 1918 of one flat in said premises or installed said Rodkin therein, and defendants alleged that, by virtue of an order entered by the Superior court of Cook County, in case No. 338042, on August 5, 1918, said defendant, Burmeister, was appointed receiver of the premises and took possession thereof, that he collected rents therefrom, that he reported his acts as such receiver to said Superior Court and his report was approved on February 2, 1919, and that the defendant, Rodkin, rented said one flat from the receiver and paid rent therefor to the receiver.

Plaintiff here assigns three errors, but the only one argued is that the trial court erred in rendering judgment against him.

We find no error in the common law record. And counsel for defendants contend that the so-called "statement of facts" contained in the transcript does not comply with clause 6th of section 23 of the Municipal Court act, and cannot here be considered. We think that the point is well taken. An inspection of the document does not disclose that it is "a correct statement * * of the facts appearing upon the trial and of all questions of law involved in such case and the decisions of the court upon such questions of law," and it is not certified to be "a correct stenographic report of the proceedings at the trial." The document states that "the following proceedings were had" before the trial judge, and then follows what is apparently a stenographic report of testimony given by plaintiff, including the offer by plaintiff of certain documentary evidence and its admission by the court, and showing that the defendant offered no evidence, and that the court found the issues for the defendant and entered judgment

against plaintiff, and then follows the statement that "plaintiff tenders this a correct statement of the facts appearing upon the trial of the above entitled cause and of all questions of law involved in such case and the decisions of the court upon such questions of law, and prays that the same may be signed, sealed and certified by the court in pursuance of the statute." Immediately underneath is the signature of the trial judge. The document does not contain a statement of the facts appearing upon the trial; neither does it contain a statement of any questions of law involved in the case and the decisions of the court thereon; and it is not properly authenticated as containing such by the trial judge. Under several decisions of this appellate court the document cannot properly be considered by us. (Dechmann, Inman & Co. v. Interstate Steel and Iron Co., 180 Ill. App., 179; Jerr v. J. Frohlich & Co., 193 Ill. App., 170; Allen v. Hutchens, 195 Ill. App. 360.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Hutchett, J., concur.

24 - 25594

AUGUST TABORSKY and
FRANK TABORSKY,
Defendants in Error,

vs.

CHARLES ZELLER,
Plaintiff in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

220 I.A. 6554

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is a fourth class action in tort, commenced in the Municipal Court of Chicago and tried before the court without a jury. The court found the defendant guilty in manner and form as charged in plaintiffs' statement of claim, assessed plaintiffs' damages at the sum of $500 in tort, and, after overruling defendant's motions for a new trial and in arrest of judgment, entered judgment against defendant, which by this writ of error defendant seeks to reverse upon the sole ground that plaintiffs' statement of claim does not state a cause of action and is not sufficient to sustain the judgment.

The transcript of the record before us does not contain any statement of facts, stenographic report or bill of exceptions. In plaintiffs' statement of claim it is alleged that:

> "Plaintiffs' claim is for the obtaining from them by said defendant on September 25, 1916, by false and fraudulent pretenses, the sum of $500 for two deeds to certain real estate not in existence at all; these plaintiffs relying upon the false and fraudulent representations of said defendant, to be damage of said plaintiffs to the amount of $500."

Defendant, in his affidavit of merits, denied obtaining said sum of $500, or any sum of money, from plaintiff by false and fraudulent pretenses or by false and fraudulent representations, and alleged that defendant gave plaintiffs a quit claim deed to certain property, conveying to them whatever right and title defendant had therein, and that plaintiffs well knew at the time they were only receiving a quit claim deed and not a warranty deed.

We do not think that the statement of claim states a good cause of action. It does not allege what the pretenses or representations of the defendant were, or wherein they were false and fraudulent, or that plaintiffs relied upon them as being true, or that at the time they were made defendant knew them to be false and fraudulent and made them with the intent to cheat and defraud plaintiffs. Not stating a good cause of action in tort, and not being aided by anything contained in the record, it is insufficient, we think, to sustain the judgment. (Gillman v. Chicago Railways Co., 268 Ill., 305; Lyons v. Hunter, 285 Ill., 336, 338.)

The judgment is reversed.

REVERSED.

Barnes, P. J., and Matchett, J., concur.

506 - 25767

LENA HENRY,

Appellee,

v.

CHICAGO RAILWAYS COMPANY,
a corporation,

APPELLANT.

APPEAL FROM

CIRCUIT COURT

OF COOK COUNTY.

220 I.A. 655

MR. JUSTICE GRIDLEY delivered the opinion of the court.

This is an appeal from a judgment for $1250 against defendant in an action for damages for personal injuries alleged to have been sustained by plaintiff about 11.45 o'clock on the evening of February 14, 1913, through defendant's negligence, while plaintiff was in the act of boarding one of defendant's street cars, east bound on 13th Street, at the intersection of Lytle street, Chicago. It was claimed that the car started with a jerk causing plaintiff to fall upon the street.

One of the points urged as grounds for a reversal of the judgment is that the trial court erred in permitting the written statement of plaintiff's witness, Henry Eiby, to be taken by the jury to the jury room.

Plaintiff, and two witnesses in her behalf (her daughter, Pearl Henry, twenty years of age, and said Henry Eiby) testified as to how the accident happened. Albert Fisher also testified for plaintiff as to happenings immediately following her alleged fall from the car. While several witnesses testified for defendant on various matters, defendant produced no eye witness to the accident, and it appeared from the testimony of two of its witnesses that no report of the accident was received by it from any employee. The jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at $1250. On the motion for a new trial the court expressed surprise that a verdict in favor of plaintiff had been returned,

but he nevertheless denied the motion and entered the judgment appealed from. The bill of exceptions discloses that during the hearing of the motion the court said: "Plaintiff, on the witness stand, delivering her testimony, x x never paused for reflection. There was no deliberation in her testimony. The oath that she took did not seem to have any restraint upon her. I do not mean by that, that all she said was untrue, I am incapable of judging it, but her whole conduct in the court room, on the stand, lacked that reflection, deliberation and thought that inspires confidence and begets credence, and instills faith, and as I say, inside of half an hour after she got on the stand, the trial seemed to me more like a joke. Yet the jury, in its wisdom, has viewed the case differently."

Plaintiff's witness, Henry Elby, on direct examination, gave his version as to how the accident happened, and during a lengthy cross examination testified fully as to all details. During his examination it appeared that, about two years after the accident and about the time plaintiff's suit was commenced, he signed a written statement, favorable to plaintiff, relating the details of the accident as he then remembered them. The court on plaintiff's motion admitted this statement in evidence. After all evidence had been heard and the jury had been instructed and they were about to retire to consider their verdict, the court, over defendant's objection, allowed said statement to be taken by the jury to their room. This document not only contained Elby's statements as to certain facts, but also his opinion that "there was no reason for the motorman to start the car as I can see; there was room in the car for more and the rear platform was not full."

Under the facts and circumstances disclosed in the present record, and in view of the decisions in Kelsey v.

Northwestern Elevated R. Co., 179 Ill. App. 119, 128, Fain v. Covenant Mutual Benefit Association, 80 Ill. App. 474, 475, Johnson v. N. K. Fairbank Company, 156 Ill. App. 391, 398, we are of the opinion that the court committed error, prejudicial to the defendant, in permitting said statement to be taken by the jury to their room, and accordingly the judgment must be reversed and the cause remanded.

Several other points are raised as grounds for a reversal of the judgment, among them that the verdict is excessive, but inasmuch as the case may be tried again, we refrain from a discussion of them.

REVERSED AND REMANDED.

BARNES, P.J., and MATCHETT, J., concur.

15794

35 - 25792

LYDIA ZIMMERMAN,
Defendant in Error,

vs.

ANNIE DARMSTAETTER,
Plaintiff in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

220 I.A. 656

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff commenced an action in case against defendant in the Circuit court of Cook County. In her original declaration she charged in substance that on and prior to December 4, 1915, defendant wrongfully and wickedly had criminal conversation with Frank Zimmerman, plaintiff's husband, whereby his affections for plaintiff were alienated and destroyed and plaintiff had been deprived of the comfort, fellowship, society, and assistance of her said husband in her domestic affairs, to her damage, etc. The defendant filed a plea of the general issue.

On the day the case was called for trial, March 6, 1919, plaintiff by leave of court filed an additional count (defendant's plea theretofore filed to stand as a plea thereto) in which she charged in substance that on and prior to December 4, 1915, defendant wilfully and wrongfully had alienated from plaintiff the affections of her said husband, without her consent, to her damage, etc.

The jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at the sum of $12,500, and on May 24, 1919, the court, after overruling defendant's motions for a new trial and in arrest of judgment, entered judgment in said sum against defendant.

This writ of error is sued out to reverse the judgment. No printed brief and argument has here been filed by plaintiff.

Counsel for defendant here contend that the trial court erred in not granting defendant's motion for a new trial, because (1) the verdict is against the weight of the evidence, (2) is so excessive as to indicate passion and prejudice on the part of the jury, and (3) certain given instructions are bad.

Inasmuch as we have reached the conclusion that the judgment must be reversed and the cause remanded for a new trial because of error prejudicial to the defendant in the giving of a certain instruction, we will not discuss the evidence.

The plaintiff was a witness in her own behalf and the principal witness for her was Hattie Fressl, a sister in law. The defendant testified at length and in her behalf Frank Zimmerman, plaintiff's husband, and John Long, the thirty-one year old son of defendant, also testified. The evidence was very conflicting. In such case it is important that the instructions should be accurate. (Lyons v. Ryerson & Son, 242 Ill. 409, 416.)

The defendant requested the court to give the following instruction:

> "The court instructs the jury that in determining upon which side the preponderance of the evidence is the jury should take into consideration the number of witnesses testifying to a particular fact or facts; the opportunities of the several witnesses for seeing and knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of this case; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial, if any; and from all these circumstances, together with all the other evidence, facts and circumstances proved on the trial, the jury may determine upon which side is the preponderance of the evidence."

The court refused to give the instruction as offered, but modified it by striking out the words above italicized, relating to the number of witnesses, and gave it as so modified.

Inasmuch as regards certain material occurrences testified to by plaintiff alone several witnesses for defendant gave testimony in direct conflict to that of plaintiff, the number of witnesses testifying became a material element in determining upon which side the preponderance of the evidence was, and we think that the court, in refusing to give the instruction as offered and in giving it as modified, committed error prejudicial to defendant. (O'Donoghue v. City of Chicago, 167 Ill. App. 349, 353; Lyons v. Ryerson & Sons, 242 Ill. 409, 417.)

We also are of the opinion that the verdict is excessive.

Accordingly, the judgment of the Circuit court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Matchett, J., concur.

1570a

22 - 25551

PIETRO CALABRESI,
Plaintiff in Error,

vs.

THE BALTIMORE & OHIO CHICAGO TERMINAL RAILROAD COMPANY, a corporation, and CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILROAD COMPANY, a corporation,
Defendants in Error.

ERROR TO CITY COURT OF CHICAGO HEIGHTS.

220 I.A. 656

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued defendants in an action on the case for personal injuries. The declaration consisted of a single count, in which it was alleged that on September 4th, 1916, plaintiff was a pedestrian, walking upon a certain street or highway, at a certain crossing of said street and a certain railroad of defendant; that the "defendant was then and there possessed of a certain locomotive engine with a certain train of cars then attached thereto, which said locomotive engine and train were then and there under the care and management of divers then servants of the defendant, who were then and there driving the same upon and along the said railroad, near and toward the crossing aforesaid, and while the plaintiff with all due care and diligence was ### walking upon and across the said railroad at the said crossing upon the said public highway there, the defendants then and there, by its said servants, so carelessly and improperly drove and managed the said locomotive engine and train that by and through the negligence and improper conduct of the defendants by their servants in that behalf, the said locomotive engine and train then and there ran and struck with great force and violence upon the said plaintiff, and thereby the plaintiff was then and there thrown with great force and violence to and upon the track there, and thereby his arm was cut off.####"

To this declaration each of the defendants filed a general demurrer. Prior to the hearing on the demurrer plaintiff asked leave to file additional counts, which was denied by the court. The demurrers of the defendants were sustained, and the plaintiff electing to stand by his declaration, final judgment was entered against him, and this writ of error has been brought to review the judgment.

The principal contention of the plaintiff is that the court erred in sustaining the demurrers. It is also urged that the court erred in refusing leave to file the additional counts. Both points raise the question squarely as to whether the declaration stated a cause of action.

In Chicago City Ry. Co. v. Jennings, 157 Ill. 474, the Supreme court of this state, affirming the Appellate court of this district (Chicago City Ry. Co. v. Jennings, 57 Ill. App. 376) held a declaration substantially similar to this one to be sufficient. The defendants argue these cases are not in point because the question there raised was whether the negligence charged was too general, while the point made here is that sufficient facts are not stated in the declaration to raise a duty on the part of the defendants towards the plaintiff. It is said this point was not made in the Jennings case, but is insisted on here, citing McAndrews v. C. I. & S. R. Ry. Co., 222 Ill. 238.

It is further urged that as his suit was against two defendants, the use of the word "defendant" in the singular number, as it appears in the body of the declaration, makes the declaration unintelligible to each of the defendants. This last objection cannot be sustained. Cutting v. Conklin, 25 Ill. 506.

We also think the description of the situation at the time of the alleged injury, as it appears in the declaration, was sufficient to raise a legal duty on the part of the defendants

towards the plaintiff, although the fact of such duty is not specifically alleged. We think under the authority of the *Jennings* case the declaration stated a good cause of action. The judgment must therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

15712

Petition denied

459 - 25726

HENRY HICKMAN,
Complainant,

vs.

SHIRLEY HILL COAL COMPANY
et al.,
Defendants.

MARY D. HICKMAN,
Appellant,

vs.

SHIRLEY HILL COAL COMPANY
et al.,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

220 I.A. 656

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

The complainant below filed his bill in which he alleged that on or about October 31, 1913, he acquired and became the owner of shares of the common capital stock of the Shirley Hill Coal Company, by virtue of an agreement made with one W. H. McDoel; that he requested brokers having the matter in charge to assign to the defendant, Mary D. Hickman, 254 shares thereof; that said Mary D. Hickman then was and now is his wife; that in so doing he did not intend to transfer the ownership from himself to her, but placed the same in her name as a matter of convenience; that she agreed to the arrangement and agreed to receipt for and hold the same subject to the disposition thereof by complainant; that all the certificates were issued in the name of defendant Lewis T. Parker, and by him witnessed in blank; that said Parker was the secretary of the company having control of its records; that said stock was issued to said Mary D. Hickman, and that she remained the nominal owner thereof until April 3, 1919; that on that date he requested her to surrender certificate #239 for 100 shares thereof, which she did, but

now refuses to surrender the remaining shares claiming the right to keep them for the support of complainant and his said wife; that on March 1, 1914, she voluntarily left the home provided for her by complainant and now resides with her relatives in the city of Halifax, N. S., and has taken with her said certificates thus placing them beyond the jurisdiction of the court; that she has collected the dividends from time to time paid thereon and is about to collect other dividends to be paid in the future which will amount in the aggregate to a large sum; that he has always amply provided for the support and maintenance of his said wife and is still willing and able to do so.

The bill prays that the certificates may be cancelled and reissued to the complainant, for an injunction against the transfer of the same and the payment of the dividends to any other.

The Corporation, Lewis W. Parker and Mary D. Hickman were made defendants. She answered the bill denying that her designation to hold the certificates was by reason of complainant's rights of ownership, but on the contrary in pursuance of an agreement between her and the complainant by which she was to find a purchaser for 300 of the total of 554 shares of the stock, which was about to be sold for complainant's debts; that 254 remaining shares should become her property and the cash surplus paid to complainant; that this agreement was consummated on or about October 31, 1913.

She denies it was not the intention to transfer the ownership of the stock to her; denies that the transfer was made for convenience or that there was any agreement to re-transfer the stock to her husband, and denies that she was to hold the stock subject to his disposition. She states that she transferred certificate #239 for 150 shares at his request because he was

in financial straits and begged her so to do, and in total denies the other material averments of the bill.

The cause was referred to a master who took the evidence, and reported that the only testimony in the record was that of complainant and defendant; that this testimony conflicted in almost every detail "that the burden of proving the agreement did not rest upon the complainant, inasmuch as defendant Mary Hickman had set up in her answer a specific and certain agreement contrary to that relied on by complainant and, therefore, that she assumed the burden of proof, and that having failed to sustain the affirmative allegations of her answer, that the issues of fact were found in favor of the complainant."

The master also made certain other findings of fact one of which was that "under the terms of the oral agreement between Mary D. Hickman and the complainant, the complainant is the owner of and entitled to the possession of certificates of stock #240 and 241." The master also recommended that a decree be entered in accordance with the prayer of the bill. Objections filed to this report were overruled by the master and were ordered to stand as exceptions on the hearing before the chancellor, who entered a decree sustaining the exception of Mary D. Hickman to the finding of the master that the burden of proof was on her, but, nevertheless, held that the allegations of the complainant in the bill of complaint were proved, and that the material allegations of the answer were not proved; found that the complainant at the time of the filing of the bill and now is the owner of 154 shares of the common capital stock of the Shirley Hill Coal Company, and ordered the defendant to surrender these certificates to the company for cancellation and pay the complainant all dividends that have accrued since the filing of the bill.

The rules of law which must be applied are well

settled and the determination of the rights of the parties must depend on whether the evidence is sufficient to prove the allegations of the bill or sustain the findings of the decree to the effect that defendant held the stock in trust for complainant. As evidence was heard before the master the chancellor had no better means than this court of judging of the weight to be given to the testimony of the witnesses. McGinnis v. Jacobs, 147 Ill. 24. Nevertheless, his findings are entitled to due weight and we would not overrule them unless clearly erroneous.

The evidence necessary to establish an oral or implied trust in personal property where the husband causes the same to be transferred into the name of his wife is stated in Shultz v. Shultz, 274 Ill. 380, quoting from Lewis v. McGrath, 191 Ill. 401, to be that "where the husband causes property to be conveyed to his wife, the presumption is that the same was given to her as an advancement, and the burden of proof is on him to establish the contrary." Therefore, irrespective of whether defendant proved the special agreement set up in her answer in view of her denial of the trust alleged in the bill the burden of proof was on the complainant to prove his case as alleged. The chancellor correctly sustained the exception to the master's report in that respect.

To establish such a trust it is necessary that the evidence shall be clear, strong and unequivocal, and it must establish the fact of the trust beyond a doubt. Van Buskirk v. Van Buskirk, 148 Ill. 9; Wells v. Messenger, 249 Ill.72. This is a rule of property not to be whittled away by reasons which partake of too great a refinement. Dyer v. Dyer, 2 Cox 93; Finch v. Finch, 15 Vesey 50. While the complainant asks that since the transaction took place in New York the law of that state should be applied thereto that law was not set up in the pleadings or proved as a fact. We cannot, therefore,

take judicial notice of it, nor hold the same controlling as against the law announced by our own Supreme Court on this subject. Shannon v. Self, 173 Ill. 253; Board of Trustees v. Railway Ticket Protection Bureau, 175 Ill. App. 464; Strauss v. American Exchange Nat. Bk., 72 Ill. App. 314.

The facts appear to be that one William H. McDeel, who was formerly the father-in-law of complainant, on or about May 28, 1913, gave complainant an option to purchase 554 shares of the capital stock of the Shirley Hill Coal Company for the sum of $41,000, and upon receipt of this sum agreed to transfer the stock to him, together with the note of complainant then held by him for the sum of $1,000. The option had been extended from time to time and was to expire October 20, 1913. Complainant evidently was unable to dispose of the stock as he desired to do and in a conversation with Mrs. Nickman with reference to the matter she suggested that John H. Davis & Co., brokers, at 10 Wall street, New York, might be interested. She testifies Mr. Nickman said:

> "'No, you go and see him.' I said, 'I will take you there.' He said, 'No, you tell him you have the stock,' but I refused. I didn't care to get mixed up in his business affairs. I thought it was a very indelicate thing, the transaction between Mr. McDeel and Mr. Nickman. This was late in May or the middle of May. The first he said to me was if I knew anybody who would be of assistance to him. That was in the beginning or middle of May, 1913 * * * . Mr. Nickman asked me to go to the John H. Davis & Company to see if he could sell the stock. I said, 'I didn't care to.' I told him I would take him, but he wanted me to go. I said, 'I didn't wish to be involved in any business of his and Mr. McDeel's,' and he said, 'You're not.' 'It is your business.' Referring to the stock he said 'It is your stock, I want it for you.' * * He always said the stock was mine, and referred to it as 'your stock'."

Complainant testified that the defendant volunteered to see Mr. Davis. He says:

> "She said, 'Shall I tell Mr. Davis that it belongs to me,' and I said, 'Yes.' I said that it would probably better facilitate the deal; that he would be more interested than if he thought the stock belonged to me.

> Mrs. Hickman went to his office, and I presumed she said the stock belonged to her, in accordance with our conversation. * * I did permit Davis & Co. to think that the stock did belong to her."

The transaction was closed prior to October 15th, through John H. Davis & Co., and on that date complainant wrote the firm as follows:

> "John H. Davis & Co. New York. Referring to distribution of proceeds of sale of 300 shares of capital stock, Shirley Hill Coal Company, that is, $45,000, and disposition 554 shares delivered to you, make distribution as follows: $41,030 to W. H. McNeel, $900 to your firm, re this transaction; balance $3070 to Mary Dwyer Hickman. Adm. advised 554 shares issued John Davis & Co. for convenience were issued in lots as follows; Four certificates, each 100 shares-two certificates, each fifty shares, one certificate 54 shares. Of these, you will please assign to Mary Dwyer Hickman certificates aggregating 254 shares.
> As suggested by Mr. Davis, I write this in anticipation of my departure for Wilmington, Del., where I shall have to be opening of court Friday morning, to the end of what remains to be accomplished in this transaction, may be concluded between yourselves and Mrs. Hickman, my principal in this behalf. * * * "

$3,070 in cash from the transaction was deposited in complainant's bank by Mrs. Hickman who knew of this letter and who went to New York to close the transaction with Davis & Co. The complainant says: "In the assignment of the 254 shares to Mrs. Hickman it was not my intention to clothe her with the ownership of them. My intention was to allow the title to remain in her temporarily until I found use for the stock." At that time they were living together as husband and wife and complainant was supporting her to the best of his ability and there were no domestic differences between them.

At the time of the transaction complainant had a home in Connecticut which was in his wife's name and worth about seven or eight thousand dollars, but encumbered for $2,500. He also had his income from his profession, the amount of which, however, does not appear.

The burden of proof being on the complainant as the chancellor correctly found, we think as the evidence is con-

flicting on the material facts and apparently evenly balanced the complainant has failed to sustain his case. It is urged that the testimony of the defendant is inconsistent with her sworn answer; that the financial situation of the complainant at the time of the transaction was such as to make her evidence improbable and negative the intention to make a gift, and it is urged that the fact that she turned over part of the property to him upon his request indicates that it belonged to him and that she held it in trust for him.

We have given all these points due consideration, but are forced to the conclusion that the transaction as narrated by the defendant is not improbable, and indeed upon the whole her version of the transaction appears to be as reasonable as his. We, therefore, think the findings of the decree cannot be sustained in view of the rules of law which are above set forth. We think it is clear the complainant failed to sustain the burden of proof cast upon him, and the decree must be reversed with direction to dismiss the bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Gridley, J., concur.

52 - 25785

15724

W. G. TENNANT,
Defendant in Error,

vs.

WILLIAM G. GREY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

220 I.A. 6564

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case W. G. Tennant, the defendant in error, brought a suit in replevin against William G. Grey, to recover possession of an automobile of the alleged value of $560, which plaintiff claimed by virtue of a chattel mortgage. The officer took the property on the writ and delivered it to the plaintiff. Trial was before the court without a jury. There was a finding of right of property and possession in the plaintiff and damages of 1 cent, and judgment entered on the findings.

The plaintiff in error has filed a motion in this court to dismiss the writ of error, alleging that it is prosecuted against his wishes. The motion is resisted by John Hemwall, who is not a party to the record, on the ground that he, not Grey, is the real party in interest.

It appeared upon the trial that defendant purchased the automobile from Hemwall, and that after the same was taken on the replevin writ Hemwall, by an arrangement with the defendant the precise terms of which are not clear, delivered another automobile to defendant, in place of the one taken on the writ. On this state of facts Hemwall now urges that he has the right to prosecute the writ, on the authority of Sumner v. Sleeth, 87 Ill. 500. It is true, as there held, that courts will look through nominal parties to the real parties in interest, and where a necessary nominal party refuses or fails to use his

name will, on indemnity being given, permit the real party in interest to prosecute the suit in the name of the nominal party. Here, no attempt was made by John Hemwall to become a party to the suit below, and the evidence fails to show that he has any legal or beneficial interest in the property in controversy. He therefore cannot prosecute the suit, and it will be dismissed.

WRIT DISMISSED.

Barnes, P. J., and Gridley, J., concur.

70 - 25840

ISABEL DAVIS,
Defendant in Error,

vs.

ABNER DAVIS,
Plaintiff in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

220 I.A. 660

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On September 3, 1919, the plaintiff, defendant in error, sued the defendant below, plaintiff in error here, in her declaration alleging that the affections of her husband had been alienated by defendant, who is the father of her said husband. She claimed damages in the sum of $50,000.

On September 29th thereafter the default of defendant was taken and entered of record and a jury called to assess plaintiff's damages. September 30th the jury returned a verdict finding defendant guilty and assessing the plaintiff's damages at the sum of $50,000, and the court thereupon entered judgment for that amount against the defendant. The defendant was not present at any of these proceedings.

October 7th thereafter, the defendant entered his appearance and moved the court to vacate and set aside the order of judgment and default theretofore entered and for leave to demur or plead to the declaration. In support of this motion certain affidavits of Lemuel H. Doty, the defendant, and his son, Abner Davis, Jr., the husband of plaintiff were submitted. These affidavits in substance endeavored to excuse the failure of defendant to file an appearance and plea in due time, and further set up a good defense on the merits. It is claimed that the affidavits were defectively executed and should not for that reason have been received, but as the objection was not made in the trial court it cannot be considered here. Eberhart v. Foster,

166 Ill. App. 175; Prout v. Lemer, 79 Ill. 331; Kruse v. Wilson, 79 Ill. 233.

The affidavit of Lemuel H. Doty was to the effect that he is a practicing attorney residing in Wichita Falls, Texas, in which place the defendant resides; that in the latter part of August, 1919, he was employed by defendant as his general attorney; that on or about the 25th day of August, 1919, the defendant came to Chicago on business and stopped at the Hotel Morrison; that while there on the 29th of August, 1919, defendant was served with summons in this case; that on August 31, 1919, affiant also came to Chicago, stopped at the same hotel and that on September 2nd, defendant called affiant's attention to the summons which had been served on him and asked affiant if he could be sued here while casually on business in the city, and at the same time turned over to affiant the said summons; that on the same day the affiant called at the office of the clerk of the Circuit court, examined the files in the case and found nothing therein except the praecipe; that while there he engaged in conversation with a gentleman who told him that he was a practicing lawyer in the city of Chicago, showed him the files in the case and asked him regarding the time in which defendant would have to plead thereto; that this gentleman answered that plaintiff had until the 12th day of September, 1919, to file the declaration, and that defendant had until the 29th day of September, 1919, within which to file his plea thereto; that this gentleman gave affiant his own name and the name of the firm with which he was associated, but that affiant has forgotten the same; that affiant left Chicago on September 5th and returned home by a different route than the defendant; that on September 26, 1919, affiant prepared a petition for the removal of the cause to the Federal Court and a bond for costs covering said removal; and that on

said 25th day of September he mailed said petition and bond to the clerk of the Circuit Court and he attaches to his affidavit the original petition, the bond and the envelope containing the same; that on October 1st he received from the clerk of the Circuit Court a reply to his letter to said clerk and this letter is also attached; that he attached to his petition for removal a principal bond in the sum of $500, which he signed as surety for the removal of the cause and inclosed a $500 liberty bond as further security; that the bond and papers were mailed to the clerk of the Circuit Court on the 25th day of September, 1919, and that affiant heard nothing further from these papers or concerning the said suit until the night of September 30, 1919, when he read in a Wichita newspaper an Associated Press despatch stating that default judgment against defendant had been entered for $50,000; that he thereupon telegraphed to a firm of attorneys in Chicago asking them to investigate and to take necessary steps to protect the defendant, and that they should wire him that day so that he could do all necessary to that end; that on September 26th he sent to the attorney for the plaintiff a letter duly stamped and mailed notifying him that defendant was applying for a removal of the cause to the Federal Court; that affiant supposed that he was well within the lawful time within which the cause could be removed; further that the defendant was relying entirely upon the affiant in the matter of the defense of his cause, and that if the alleged judgment is allowed to stand against the defendant it would work great hardship and unjust financial loss.

The affidavit of defendant sets up his residence at Wichita Falls, Texas, the serving of the summons at the hotel while he was temporarily here, and that on September 2, 1919, he turned said summons over to Doty, and instructed him to attend to it, to enter affiant's appearance as affiant's

attorney, and that in sendeing he relied solely upon said Doty to defend said suit in affiant's behalf, affiant having no other attorney. In other parts of the affidavit he sets up facts tending to show a good defense on the merits.

The court in passing upon the motion to vacate and set aside the default and judgment permitted counter affidavits on the merits to be filed and read. These were, however, inadmissible. Gilchrist Transportation Co. v. Northern Grain Co., 204 Ill. 510; American Mail Order Co. v. Marsh, 118 Ill. App. 250; Kloepher v. Osborne, 177 Ill. App. 384, p. 393.

It is undoubtedly the rule of law in this state that motions of this kind to set aside a default judgment and for leave to plead are addressed to the sound discretion of the court and will not be reviewed except in case of abuse of such discretion and that a party seeking to have a default set aside must show that he acted with due diligence to protect his rights, and that he has a meritorious defense. Nitsche v. City of Chicago, 280 Ill. 268. But it is also true that by long and well settled practice in this state the courts have been liberal in setting aside defaults at the term in which they were entered, where it appears that justice will thereby be promoted. In Mason v. McNamara, 57 Ill. 274, the court said:

> "But where it appears by affidavit that the party has a defense to the merits, either to the whole or a material part of the cause of action, it has been usual to set aside the default if a reasonable excuse is shown for not having made the defense. It has also been the practice to impose reasonable terms upon the defendant, as a condition to allowing his motion, such as that he plead to the merits, that he pay the costs, or that he comply with such other reasonable terms as may be imposed. In such cases the object is that justice be done between the parties, and not to permit one party to obtain and retain an unjust advantage."

See, also, Waugh v. Butler, 3 Ill. App. 271; Mallen v. Penney, 209 Ill. App. 230; Allen v. Hoffman, 12 Ill. App. 573; Dunlap v. Gregory, 14 Ill. App. 601; Black v. Casey, 22 Ill. App. 412;

C. of Moline v. I. R. & C. Ry. Co., 262 Ill. 52; McMurray v. Peabody Coal Co., 281 Ill. 218.

It is suggested that the employment of Mr. Doty, a non-resident attorney by the defendant, was negligence on his part, but we do not think it should be so held under the circumstances disclosed. Fink v. Hicks, 137 N. Y. 424.

While the affidavits show that the non-resident attorney of defendant did not exercise the highest degree of diligence, we are inclined to think that in view of the amount of the judgment the disclosure of an adequate defense on the merits, the proof of an intention of the defendant in good faith to defend, coupled with the unquestioned fact that he promptly moved to set the judgment aside, and that the motion could have been granted without any material injury which could not have been adequately compensated by conditions imposed, the court should have set aside the default and judgment, and that it was an abuse of its discretion not to do so.

For these reasons the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

419 - 25680

Filed February 14, 1921.

15794a

H. A. HALL for use, etc.,
Appellee,

vs.

JOHN R. ROBERTSON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

220 Ill. 657

PER CURIAM.

On a trial before the court there was a finding and judgment in favor of plaintiff and against defendant for $1085 and costs of suit. From this judgment this appeal is prosecuted.

The cause has been called, taken and argued in this court and the briefs of the respective parties filed. Since the submission of the cause to the court the parties have appeared and have filed a stipulation and agreement that the judgment appealed from be reversed at the cost of appellee.

In pursuance of the stipulation and agreement of the parties above recited, the judgment of the municipal court is reversed with costs against the plaintiff in this and the Municipal court.

REVERSED.

47 - 26165

1575

ADA M. FLETCHER, Administratrix
of the Estate of ROLLIN S. TEARS,
Deceased,
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY et al.,
Defendants in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

220 I.A. 657

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is a writ of error sued out by plaintiff in an effort to reverse a judgment of nil capiat entered upon a verdict instructed by the court upon the motion of defendants.

The court instructed the verdict upon the theory that plaintiff's intestate at and immediately preceding the fatal accident to him was guilty of negligence which was the proximate cause of the accident, and that he was not at that time in the exercise of that due care for his own safety which the law exacts as a sine qua non to a right of recovery.

If the plaintiff's intestate was not in the exercise of ordinary care for his own safety at the time of the accident, it is unnecessary to inquire into the question of negligence of the defendants. The guiding principle regarding the exercise of ordinary care on the part of the plaintiff is concededly as stated in I. C. & L. S. Ry. Co. v. Johnson, 135 Ill. 641, thus:

> "The court can never be called upon to say to a jury that negligence has been established as a matter of law, unless the conduct of the injured party has been so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent."

And as stated in Libby v. Cook, 242 Ill. 306:

"If there is in the record any evidence from which, if it stood alone, the jury could, 'without acting unreasonably in the eye of the law,' find all the material averments of the declaration have been proven, then the cause should be submitted to the jury."

And that the plaintiff is entitled, on a motion to direct a verdict, to the benefit of the most favorable evidence and the most favorable inferences that may properly be drawn from such evidence. McGregor v. Reid, 178 Ill. 484.

With these principles in mind as a guide we shall proceed to discuss the facts as developed by the evidence in the record.

The accident happened shortly after seven o'clock in the morning of July 28, 1917, at the northeast corner of Sixty-third street and Kimbark avenue. The morning was clear and bright. Deceased lived three blocks away from the place of the accident, at Sixty-first street and Kenwood avenue. He was employed in the meat department of the Pen-Yan store at the southeast corner of the streets where the accident occurred. He was in good health, with hearing and vision unimpaired. It is therefore apparent that he was well informed of the conditions at that corner. Deceased at the time of the accident was on his way to the Pen-Yan store, the place of his employment. The elevated structure at this point rested on posts fifty feet apart, which were placed at the edge of the sidewalk; these did not obstruct deceased's view to the east. The sole object which would have interfered with such view was a sprinkling cart drawn by two horses. The water plug at which the wagon was stopped was between the front and back wheel of the wagon and about two feet east of the building line. The horses stood over the crosswalk. Until the south edge of the sidewalk was reached neither cart nor horses was likely to obstruct a view of the approaching car by a pedestrian walking southward to cross the sidewalk; before reaching that point,

The wagon

the merest glance would have enabled such pedestrian to see the approaching car. Deceased was evidently aware that the sprinkling cart and horses created an obstruction to his view as he stepped around the horses' heads; after reaching the south horse he had an unobstructed view eastward on Sixty-third street. Instead of deceased looking to the east, from which point the car was approaching, he looked in front of him to the south or to the southwest, which was away from the point from which the car was approaching, and while so looking walked toward the car tracks.

It is in evidence that deceased never looked up when shouted to by persons who noticed that he was in danger of being struck by the car, but that he turned his head just before he was struck. His injuries would indicate that he was struck while walking southward in the path of the car, and that he did not turn his head to the east until a moment before he was struck.

There is some testimony about noise made by a passing elevated train, but this had no effect in obstructing deceased's view of the approaching car if he looked east. It seems that no attempt was made to stop the street car until it was five or six feet east of the line on which deceased was walking south, for the reason that prior to that time the motorman's view of deceased's approach was obstructed. However, the car was stopped immediately and before the rear end of the car reached deceased. All of the witnesses agreed that the car made a quick stop. One witness testified that:

> "He was lying pretty close to the rear end of the car. The rear end hadn't gotten by him. He was alongside of it at the rear end. I helped to pick him up."

Another witness testified:

> "When the car finally stopped he lay close to the rear trucks of the car. The rear trucks of the car were about

even with the back of the horse, when it stopped. The man was lying alongside of the rear truck."

The law in this State imposed upon plaintiff the burden of proving that deceased was not guilty of contributory negligence.

No witness testified to any act of precaution on the part of deceased or that he looked to the east before stepping into the track of the approaching car. Devine, Admr. v. Chicago City Ry. Co., 207 Ill. App. 28.

The motion for an instructed verdict, which was allowed, presented to the trial court a question of law. While we do not hold that deceased was, as a matter of law, guilty of contributory negligence, we are of the opinion the record shows that he was guilty as a matter of fact. Under such circumstances it would be useless to reverse and remand because of technical error in giving the peremptory instruction, for under the evidence no other verdict could properly be returned. Such an error is therefore harmless and does not require a reversal, and the judgment is therefore affirmed.

AFFIRMED.

Dever and McSurely, JJ., concur.

1Ab - 26295

157-4

U. S. BANKING CO., OF CHICAGO,
a corporation,
Appellee,

vs.

THOMAS C. O'BRAM, JOHN A. PAGINI
and AMELIA PAGINI,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

220 I.A. 657

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

Defendants leased in writing from the plaintiff the premises at 4461 West Harrison street, Chicago. The lease was dated December 30, 1911, and the term demised was from January 1, 1912, to October 29, 1912.

The premises were taken by defendants with the intention of making certain alterations for the conversion of same into a theatre. It was necessary before these alterations could be made to get a permit from the Building Department of the City of Chicago. While defendants made several applications for such permit, none was obtained. There is no dispute about the execution of the lease.

Defendants went into possession of the premises and started some alterations, but such alterations were never completed. It was in evidence that a Mr. Strauss ran a clothes pressing business in the premises for a time; although it does not appear under whom he went into possession, it does appear that he was not in possession with the authority or consent of plaintiff.

The lease remained in full force during its full term, without cancellation, and the keys during that time were not returned to plaintiff nor was any effort made by any of

the defendants to procure plaintiff to consent to a cancellation of the lease or an abandonment by them of the demised premises. It is said that after the lease went into effect an ordinance was passed by the City requiring a side exit from buildings used for theatre purposes, which defendants were unable to comply with on account of the situation of the building.

A judgment was obtained for the amount of rent due under the lease, which defendants moved to set aside and to be let in to plead. Defendants were permitted to defend, and on a trial before court and jury the court instructed a verdict in favor of plaintiff leaving in force the judgment for $430 as originally entered. From this judgment this appeal is prosecuted.

We think the court was justified in instructing the verdict, for there was no evidence to support defendants' contention that the lease was cancelled or surrendered or that anything was done between the parties changing the relationship created by the execution and delivery of the lease to the premises in question. The burden of proving a surrender or a change in the conditions of the lease was upon the defendants and they failed to make any such proof. Keenlan v. Hearth, 151 Ill. App. 582.

The lease could not be terminated before its expiration except with the mutual consent of the parties lessor and lessees. Lewis v. Fish, 40 ibid 372.

So far from there being any evidence that defendants were kept out of possession of the demised premises, there was direct evidence that they were in actual possession. Furthermore, there was no obligation upon the landlord to put defendants in possession; they could enter under the covenant in the lease (Gazuele v. Chambers, 73 Ill. 75), and there is ample proof that they did so.

If it be true that the conditions of the building

ordinance were such that defendants could not comply with them so as to be able to operate the premises as a theatre, as was their intent, this imposed no obligation upon plaintiff to cancel the lease because the law presumes that they entered into the lease with the knowledge of such ordinance. Fierman v. Rush Temple of Music, 229 Ill. 494.

An abandonment by defendants of possession of the demised premises did not exonerate them from liability to pay rent according to the terms of the lease, nor would such abandonment operate to cancel the lease or relieve them from payment of such rent. Hamilton v. Wheeler, 175 Ill. 214.

There being no reversible error in the record, the judgment of the Circuit court is affirmed.

AFFIRMED.

Dever and McCurdy, JJ., concur.

176 - 26345

15776

TESSIE J. OFT, Administratrix of the Estate of JOHN F. OFT, Deceased,

Appellant,

vs.

ALBERT J. REHM,

Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

220 I.A. 657

MR. PRESIDING JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of nil capiat entered upon the verdict of a jury in favor of defendant. As the judgment must be reversed and the cause remanded for a new trial for errors of law, we shall not express any opinion as to what the evidence may tend to prove.

Plaintiff's intestate died as the result of injuries said to have been inflicted by an automobile operated by defendant.

There was offered and received in evidence, against the objection of plaintiff, the verdict of the coroner's jury rendered on the inquest held upon the body of the intestate, in which inter alia the jury found that, "From the evidence presented the jury believe this was an unavoidable accident and therefore exonerates the said Albert J. Rehm from all blame." Such verdicts are inadmissible since the Act of the legislature in force July 1, 1910, which provides that the verdict of a coroner's jury shall be inadmissible in an action for damages against the person charged with causing the injury. The coroner's verdict in this case decided the very question which the jury was impaneled to try and was a clear invasion not only of its prerogative but its duty. In Peoria Cordage Co. v. Industrial Board, 264 Ill. 90, it was held that "such a verdict is merely advisory to the public authorities charged with the administration of the criminal law." In

Spiegel v. Industrial Commission, 288 ibid 422, it was held a coroner's verdict was not admissible in evidence in a civil case, and the court said:

> "Therefore all of the foregoing cases, and all other cases of this court containing similar holdings, are as to such holdings expressly overruled. We are moved to do this for several reasons. A review clearly discloses that many of the cases, if not all of them, have been largely controlled by the admission in evidence of the verdicts of the coroner's jury, and in many of them such verdicts have furnished the sole evidence to establish liability. As a consequence of such practice there has resulted in this state a race and scramble by litigants to secure a favorable coroner's verdict that would influence or control in case a civil suit should be brought to establish a claim by reason of death."

The instruction to the jury to disregard that part of the coroner's verdict which found that the accident was unavoidable was in no sense curative of the error. Ravenscroft v. Stull, 280 Ill. 406.

Defendant attempts to meet this error by contending that the statute supra has no application forsooth because it was not in effect at the time of the accident, which occurred November 10, 1919, nor when the suit was instituted March 18, 1919. It is a complete answer to this contention to say that the Act supra regulated procedure on the trial; that the trial was had after the Act took effect; and that no one has any vested rights in procedure which the legislature may change at will, even to cutting off the right of recovery by an appropriate amendment to the statute of limitations. However, disregarding the statute, the coroner's verdict was not admissible as evidence in this case.

The instruction regarding the intestate's duty to look for approaching automobiles was misleading. The deceased was at a crossing waiting for a car to board it. In such circumstances a failure to look would not alone prevent a recovery if defendant's negligence was the proximate cause of the accident, for at such a crossing it was defendant's duty to be on the look-

out for pedestrians waiting for a car and not to negligently drive his automobile to the injury of any of them. It was error to instruct the jury that failure of deceased to look for approaching automobiles would of itself defeat a recovery. Firchner v. Davis, 185 Ill. App. 600. The reasoning in Repleck v. Schlatter, 185 Ill. App. 355, is in point in the instant case. The court there said:

> "Although the operator of this particular machine testified that he did not see the appellee before his machine ran into him, still he was bound to assume that people would be at or about this crossing, and he should have given 'reasonable warning' or else he should have been ready to give such warning if any person did appear to be about to use said crossing." Keenning v. Nelson, 197 Ill. App. 504; Graham v. Hagman, 270 Ill. 354.

For the errors indicated the judgment of the Circuit court is reversed and the cause is remanded to that court for a new trial.

REVERSED AND REMANDED.

Hover and Heaurely, JJ., concur.

214 - 26387

EMILY RYDL,
Appellee,

vs.

JOSEPH KYRC,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

220 I.A. 657

MR. PRESIDING JUSTICE SULLOR
DELIVERED THE OPINION OF THE COURT.

This action is for a breach of promise of marriage. The trial was before court and jury and there was a verdict in favor of plaintiff for $500 and a judgment thereon, from which defendant prosecutes this appeal.

Defendant complains that the verdict is not supported by the evidence and that there are infirmities in some of the instructions.

Defendant lost his wife by death April 27, 1918. Plaintiff is his deceased wife's sister. The evidence sustains a promise on the part of defendant to marry plaintiff and a failure to carry out such promise; in fact defendant put himself in a position where he was unable to fulfill his promise by marrying another woman.

While the promise to marry was not at first at a fixed date, the law will presume that the promise was to be performed within a reasonable time. Defendant contends that plaintiff refused to marry him, but it seems to be the fact that the engagement took place soon after the death of defendant's wife, though out of respect to her memory the date of the marriage was by agreement deferred.

However, in March, 1919, the parties agreed to be married in

the month of May following; notwithstanding which agreement defendant married his present wife April 19, 1919.

Reading the instructions as a whole, we find no infirmity in any of them justifying a reversal of the judgment, and, as said in Foster v. Turpin, General number 25391, opinion of this court filed January 10, 1921, and not yet reported, "we are not at liberty to disturb the judgment unless from the record we can say that it is contrary to the manifest weight of the proofs. This we are not able to do." These remarks are equally applicable to the instant case.

The amount of the judgment is reasonable, and finding no cause for reversal the judgment of the superior court is affirmed.

AFFIRMED.

Dever and McCurdy, JJ., concur.

130 - 26287

JANE WATKINS FRENCH,
Defendant in error,

vs.

LOUIS T. FRENCH,
Plaintiff in error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

220 I.A. 658

MR. JUSTICE McCULLOCH DELIVERED THE OPINION OF THE COURT.

Defendant seeks the reversal of a decree awarding complainant separate maintenance of herself and child.

It was claimed that the bill of complaint is insufficient in that it fails to show that the separation was without the fault of the complainant as required by the statute. The argument is that the recital of the bill shows that the separation was by the voluntary consent of both parties and therefore comes under the rule that such a separation is not without the fault of the complainant, within the meaning of the statute on Separate Maintenance. Decker v. Decker, 279 Ill. 300; Jamison v. Johnson, 125 Ill. 510.

We are of the opinion that the bill alleges facts sufficiently showing that the separation was without complainant's fault. It alleges a course of conduct by the defendant towards the plaintiff tending to make complainant's married life unbearable. It alleges that defendant used vile, abusive words and epithets towards her in the presence of third persons; that he had kept away from complainant without any reasonable cause during a large part of their married life; had instructed tradespeople to discontinue their accounts and dealings with complainant and had been guilty of adulterous conduct with a woman whose apartment he had frequently visited in so open and notorious a manner as to become a public scandal; he refused to change his conduct

although complainant had begged him to do so. These alleged facts warranted complainant in leaving the defendant and sufficiently show that the separation was without her fault. Subsequently defendant agreed to pay for her maintenance and the support of their son, but this does not make the separation voluntary with consent of complainant. A similar arrangement made under almost like circumstances was held not to be a bar to the assertion of complainant's rights in an action for separate maintenance. Behringer v. Behringer, 155 Ill. App. 191. Of like character are the rulings in Ross v. Ross, 69 Ill. 373; Porter v. Porter, 168 Ill. 398; Johnson v. Johnson, 123 Ill. 510.

It is next said that the decree should be reversed because the evidence is not preserved in the record by a bill of exceptions and that the decree contains no findings of fact. It is the rule that in chancery (except cases where the parties are entitled to a jury trial) it is incumbent upon the party wishing to maintain a decree in a court of review to preserve in the record the evidence justifying the decree. (Chmen v. Chmen, 233 Ill. 632) but this is not necessary if the decree contains a recital of the ultimate facts proven. Rybakowicz v. Rybakowicz, 290 Ill. 55[illegible]. The present decree finds that the allegations in the bill are true and "that the complainant is living separate and apart from the defendant without her fault." This is a sufficient finding of an ultimate fact. To recite more would necessitate a long narrative of the conduct and relations of the parties for a period of years. Findings in a decree that the allegations of the complainant's bill of complaint are true are not of themselves sufficient to sustain the decree where the evidence is not preserved in the record. Mecklenberg v. Mecklenberg, 242 Ill., 1[illegible]. In Berg v. Berg, [illegible] Ill. [illegible], the decree contained a finding that the wife was living separate and apart from her husband without

her fault; we do not understand this case to hold this is not a finding of fact. The controlling factor seems to have been that the evidence in the record was not sufficient to sustain the finding of the decree as to separate maintenance.

While the finding in the present decree may be in a sense a conclusion, yet it is hardly more a conclusion than would be findings as to the conduct of the parties during their married life. Findings of fact which could in no sense be called conclusions would be the recital of a multitude of evidentiary details not properly included in a decree.

We are not persuaded that the decree was erroneous and it is therefore affirmed.

AFFIRMED.

Holden, P. J., and Dever, J., concur.

140 - 26307

WILLIAM R. MUMFORD and CLARENCE R. MUMFORD, doing business under the name and style of W. R. MUMFORD & COMPANY,
Defendants in Error,

vs.

EDWARD F. MUELLER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

220 I.A. 658

MR. JUSTICE McCURDY DELIVERED THE OPINION OF THE COURT.

Defendant seeks the reversal of an order denying his motion to vacate a judgment for $[illegible].60 entered against him by default.

The statement alleged a breach of contract and summons was served on defendant August 11, 1920. Defendant not appearing, judgment by default was entered against him August 17th. August 23rd motion was made to vacate and set aside the judgment, which motion was supported by an affidavit of the defendant stating in substance that he telephoned to the office of his attorney August 16th, was informed that his attorney would return from his vacation in time to attend to the case, but that the attorney did not return until after the judgment had been entered. The only thing defendant says as to the merits of the case is, "that he verily believes that he has a good defense to this suit. upon the merits to the whole of plaintiff's demand."

A motion to set aside a default judgment is addressed to the discretion of the court and an affidavit supporting the motion must not only explain the apparent negligence, but must show a meritorious defense by setting forth the facts, not a mere conclusion of law drawn from the facts. Roberts v. Corby, 86 Ill. 182; Culver v. Brinkerhoff, 180 Ill. 348.

Even if defendant's affidavit should be considered as having given a satisfactory explanation of the negligence of the defendant in failing to appear in the case, which is very doubtful, it does not even attempt to set forth any facts from which the court could draw any conclusion as to whether there was a meritorious defense.

The trial court was justified in denying the motion, and the judgment is affirmed.

AFFIRMED.

Holden, P. J., and Dever, J., concur.

162 - 26331

ALFRED FREEK and OTTO FREEK, Copartners doing business as HENRY FREEK SONS,
Appellants,

vs.

W. A. BAYOR,
Defendant,
SECOND SECURITY BANK,
Garnishee,
GRACE E. BAYOR, Intervening Claimant,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

220 I.A. 658

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment favorable to the claim of Grace E. Bayor as intervening claimant to certain funds.

Plaintiffs had judgment against William A. Bayor for $199.86, the Second Security bank was garnisheed and answered that William A. Bayor had an account with it and the balance of said account April 3, 1918, was $434.13. The evidence shows that this answer was not strictly accurate; that the deposit was in the name of Grace E. Bayor and William A. Bayor, who are husband and wife. The uncontradicted evidence also shows that the money in this account was the exclusive property of Grace E. Bayor and the moneys deposited came from rents of property belonging to her. William Bayor collected these rents, drew checks on the account to pay his wife's bills in connection with the property and for her personal expenses.

Under such circumstances can the money in this account be garnisheed for the debt of the husband alone? In Keen v. Keen, 172 Ill. App. 183, it was held that if the deposit in the bank of the garnishee actually belonged to the wife, it could not be reached by garnishment upon an indebtedness of the

husband, citing May v. Baker, 15 Ill. 89; Illinois Central R.R. v. Weaver, 54 Ill. 319; Webster v. Steele, 75 Ill. 544. In Byers v. Illinois Trust & Savings Bank, 146 Ill. App. 592, opinion by Mr. Justice Holdom, it was held that in a garnishee proceeding it was competent to prove whether the money due from the garnishee was in fact the property of the husband although payable to the wife, citing Scuder v. Ridgeway, 49 Ill. 522, and Hair, etc. v. North Western National Bank, 50 Ill. App. 411.

> "The general rule is that where property owned in common is in the possession of a third person, or where debts are due to the principal defendant and third persons jointly, such property or debts are not subject to garnishment proceedings to reach a debt due by the principal defendant alone." 20 Cyc. 1030.

This is supported by many citations.

We do not understand section 2 of the Act in relation to Joint Rights and Obligations in force July 1, 1919, has changed the general rule. It does not purport to affect the ownership of the joint deposit, but simply gives protection to the bank by providing that a payment made to any one of such depositors, whether the other or others be living or not, where all parties have signed an agreement thereto, shall be a sufficient discharge from all parties to the bank for any payment so made.

There is also merit in the suggestion that if the bank had answered accurately it would have said it had no money in its hands belonging to William A. Bayer, but the account was in the names of William and Grace Bayer; thereupon the court should have discharged the garnishee. Siegel, Cooper & Co. v. Schueck, 167 Ill. 522; Richardson v. Lester, 83 Ill. 55.

We hold that the judgment of the trial court was right and it is affirmed. AFFIRMED.

Holdom, P. J., and Dever, J., concur.

202 - 26375

PHILIP D. KAPLAN,
Appellee,

vs.

ISAAC STEIN, doing business as Stein Textile Company,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

220 I.A. 658

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

September 30, 1916, Philip D. Kaplan, complainant, and Isaac Stein, defendant, entered into a written contract with reference to the joint business of buying and selling merchandise. After a time disagreements arose and August 8, 1918, Kaplan filed his bill asking for an accounting of the proceeds of the business. An answer was filed and reference had to a master in chancery to determine the preliminary question as to whether Kaplan was entitled to an accounting. The master found that he was. Exceptions to the report were overruled and a decree entered by the chancellor in accordance with the finding; from this Stein appeals.

The evidence shows that prior to the making of the contract Kaplan was a broker in textile fabrics and Stein was a jobber and manufacturer of men's and boys' clothing. Stein wished to open a new department for handling silks, dress goods and similar fabrics, in which merchandise Kaplan was an expert. It seemed it would be mutually profitable for Kaplan to handle this proposed new department in Stein's place of business, and the contract of September 30, 1916, was made. This provides in substance that Kaplan was to purchase and make sales of silks, dress goods and other fabrics, all to be approved by Stein. Kaplan was to receive one-half of the net profits from this

department as compensation for his services. There were other provisions with reference to the division of the profits and all losses were to be borne by both parties in equal shares. It was also stated that this was a contract of hiring and not of partnership, and that Kaplan had no power to bind Stein to any contract until Stein had ratified it; also that either of the parties might terminate the contract at will. By a subsequent writing dated January 11, 1919, the parties agreed that the net profits should be divided, sixty per cent to Stein and forty per cent to Kaplan.

There is only one question now to be determined, namely, whether, as claimed by Stein, the contract was terminated by mutual agreement on March 25, 1919. His version is that at this time, after Kaplan had returned from New York where he had been buying goods, they had a conversation in which he criticised Kaplan's purchases, which led to a dispute between them; that Kaplan said, "I am through," and wanted to be released from his contract, and he, Stein, said, "I accept your proposition and I am through; now you be kind enough to bring me my contract and we are through;" that Kaplan said his contract was at home but that he would bring it the next day, but later said he could not locate it; that Kaplan then made a proposition for Stein to pay him fifty dollars a week, "for my salesmanship, I will go out and sell goods for you," and he would pay Stein $100 a month for space in his premises; that he, Stein, accepted the proposition, saying, "I will give you fifty dollars a week every night on Saturday of every week and you have to give me $100 for the rent for occupying" space for the goods; and that Kaplan said, "I will pay you $100 a month for it." Kaplan denies this entirely, testifying that nothing was said about terminating the

contract until May 29, 1910; that then Stein told him he wished to sell out and divide the profits; that Kaplan suggested that instead of selling the goods on terms of sixty or seventy days, they be sold for cash or thirty days at the longest, to which Stein agreed, and Kaplan continued in the same place of business with Stein, engaged in selling the stock of goods. July 26th Kaplan took his goods from the store and ceased to have anything further to do with the business.

A number of witnesses testified supporting Stein's version of the alleged conversation in March, one of these his daughter and another his son-in-law. Kaplan's story as to the termination taking place in May is supported by the testimony of a witness claiming to have heard that conversation. It is impossible to reconcile the variant stories of the witnesses; the true version depends upon their credibility. The Master in Chancery saw the witnesses and heard them testify and was much better able to judge as to which story was the more believable than are we. We should not depart from his conclusion in this regard unless the entire record convinces us that he is mistaken.

While there are a number of matters which tend strongly to give support to Stein's version of the matter and to throw some doubt upon Kaplan's story, yet we are of the opinion that there are more convincing considerations confirming Kaplan's version. Among such circumstances is the fact that after the alleged termination of the contract in March the relations of the parties apparently were the same as before, Kaplan continuing to sell merchandise and Stein speaking of him to various persons as his partner; furthermore, in April they went together to New York and bought $110,000 worth of goods for the business. This would seem to negative any claim that the contract had been

terminated the month before in a quarrel. It is in evidence that Stein told Kaplan that the business of March showed a net profit of $1,100, and showed a statement to that effect. The accuracy of these figures is not important, although argued earnestly by counsel. It is important that the incident is not denied by Stein.

Beginning with March 25th Stein's books show a number of payments of $50 under the head of "Salary." Kaplan admits receiving these checks but claims it was because of an agreement he made with Stein shortly before that date, whereby he was to have a drawing account of $50 a week, which he drew at irregular intervals. The Master properly could accept Kaplan's explanation for a number of reasons. If, as Stein testified, Kaplan was to pay him $100 a month for rent after March 25th, which was never paid, Stein would hardly continue making payments as salary while this rental was accumulating and not paid. Stein testified that the salary was paid every Saturday night, and this is supported by his bookkeeper. The checks showing these payments were in evidence and show that they were not paid on Saturday nights but at irregular intervals, as Kaplan testified. Furthermore, although the bookkeeper testified that she had in her possession the check stubs showing for what purpose these checks were paid, and was requested then and at a later hearing to produce them, she subsequently testified that she could not find them although she had seen them shortly before in the safe where they had always been kept. There is good reason to believe that these check stubs disappeared from their usual place about the time the witness was requested to produce them. From the failure of Stein to produce evidence which was in his possession, it is proper to presume that it would have sustained Kaplan's story as to the purpose of the $50 payments.

The rule is that withholding or failing to produce evidence which under the circumstances would be expected to be produced, and which is available, gives rise to a presumption against the party. Hester v. Hester et al., 3 Gil. 119; Huntemyn v. Reilly, 184 Ill., 203; Hartford Life Insurance Co. v. Sherman, 183 Ill. App. 518; Cartier v. Troy Lumber Co., 138 Ill. 533. The maxim is Omnia praesumuntur contra spoliatorem.

A number of other circumstances and details are discussed by both counsel. It would unnecessarily lengthen this opinion to comment upon them. We have noticed only the more important points, and these, with consideration of all the record, lead us to the opinion that the Master's report was correct and that the decree entered in accordance with its recommendation should not be disturbed. It is therefore affirmed.

AFFIRMED.

Holdom, P. J., and Dever, J., concur.

AGS - 26381

L. J. KIRAGA,
Appellee,

vs.

E. F. MOWER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

220 I.A. 658

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment against him in a forcible detainer suit tried by the court.

In April, 1940, plaintiff bought the property occupied by defendant. The rent fell due May 15th, at which time the parties had a conversation with reference to the apartment. Plaintiff testifies that he told defendant he wanted possession, but would give him time to get into another place; that plaintiff would send his family out into the country for three weeks when school closed and when they returned plaintiff "would want the place for sure." Defendant's version of the conversation is somewhat different. He testified that plaintiff told him if he wished to continue he could stay for a year or "the balance of the year." July 13th defendant was served with a thirty-day notice of plaintiff's wish to terminate the lease and asking for possession on August 14, 1940. Defendant refusing to give possession, plaintiff brought this suit.

Defendant asserts that he was in possession as a holdover after the termination of a prior written lease and therefore was a tenant from year to year, entitled to sixty days notice of termination. The written lease upon which this claim is predicated

does not appear anywhere in the record. No such document was introduced in evidence. We cannot assume its existence nor consider any argument based thereon.

The case turns solely upon the variant versions of the conversation above referred to, the truth of which the trial Judge could better determine than can we. We see no reason to disagree with the conclusion of the court that the evidence showed a tenancy from month to month, which was properly terminated by the thirty day notice. The judgment is right and is affirmed.

AFFIRMED.

Holden, P. J., and Dever, J., concur.

417 - 26390

FRANK G. BAKER,
Appellant,

vs.

ANNA E. HILL,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

220 I.A. 659

MR. JUSTICE MORMELY DELIVERED THE OPINION OF THE COURT.

In a suit to recover the value of six pigs the court found the defendant not guilty and entered judgment accordingly, from which plaintiff appeals. Defendant does not appear in this court.

The evidence shows that plaintiff made an agreement with A. E. Hill, the brother and agent of defendant, with reference to what is described as a thoroughbred Hampshire sow, that it should be bred and cared for on the Hill farm in Du-Page County until a litter of pigs was raised and that they and the sow should be cared for and properly kept until the little pigs were old enough to be taken from the mother, for which services plaintiff was to pay $5.00 a month. This amount was duly paid and received without question by the defendant for ten successive months, when she notified plaintiff that the pigs were old enough to be taken away and requested plaintiff to this effect. When plaintiff called for this purpose defendant refused to deliver possession of all the pigs, claiming that three of them belonged to her. Suit was then brought for possession, which was refused and subsequently defendant sold the pigs.

By defendant's affidavit of merits an indebtedness to plaintiff of $86.17 was admitted and defendant introduced testimony tending to support this. In view of this admission we do not see how the trial court could justify its judgment

that the plaintiff take nothing.

Defendant seemed to claim that part of the litter belonged to her because of some prior dealings she had with the company that sold the sow to plaintiff, but no evidence supports this. Upon the record the trial court should have found with plaintiff's version of the contract, that defendant had received payment in full for all services and that plaintiff was entitled to recover the value of the pigs.

This case should not be remanded for the expense and trouble of another trial. Although some of plaintiff's evidence as to values was improperly stricken there is sufficient in the record for us to arrive at a conclusion as to what the animals were worth. The old sow as a registered animal should be valued at $100. The five little pigs, because of the absence of testimony as to the character of their sire, must be valued upon the market basis as unregistered animals. The evidence showed this would be $20 a hundred, and the five pigs weighing 200 pounds would make their value $40, or the value of all the pigs at the time of the demand was $140.

For the reasons above indicated, the judgment of the municipal court is reversed and judgment for the plaintiff is entered in this court for $140. All costs both here and in the trial court to be taxed against the defendant.

REVERSED AND JUDGMENT HERE.

Holden, P. J., and Dever, J., concur.

26743

15848

JOHN H. BOWES,
Appellee,

vs.

THEODORE ZOEBL and
MARY ZOEBL,
Appellants.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT OF COOK COUNTY.

220 I.A. 659

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from an order granting a temporary injunction without notice to defendants that it would be applied for.

It is argued for reversal principally that it does not appear from any averment of the bill or any accompanying affidavit, that the rights of complainant would be unduly prejudiced unless the injunction was granted without notice, as required by sec. 5, chap. 69, R. S., and that the duration of the injunction is for an indefinite time.

The bill avers that complainant and defendants own adjoining property; that complainant's property is improved with a factory building which was erected at an expense of $325,000; that the land of defendants is vacant and unimproved; that the building is a mill constructed building with a concrete foundation and brick walls. The bill charges that defendants have maliciously, wilfully and for the purpose of injuring complainant and his building, excavated a ditch or trench along the boundary line of the premises owned by the respective parties to a depth of more than four feet below grade, resulting in the exposing of the foundation of complainant's building, and that the excavation has been made for the express purpose, as stated by defendants, "of

causing the foundation of your orator's building to freeze in freezing weather;" that to further injure complainant and his said building, defendants had maliciously and wilfully poured water into such trench and had permitted surface waters to accumulate therein for the purpose of making the foundations of complainant's building unsafe; that cold weather setting in would cause the same to freeze and crack and thus destroy or damage complainant's building; that the excavation was made for the sole purpose of injuring complainant and his building; that defendants do not contemplate erecting any structure upon their premises, but have threatened to keep the premises excavated until complainant shall have paid them large sums of money or purchased their property at an exaggerated price. The bill sets forth further that while defendants are solvent, they are people of very limited means and totally unable to financially respond for the great damage which complainant would suffer to his building by reason of defendants' actions; that such damage would be irreparable and might cause loss of life should the wall of complainant's building be so injured by the actions of defendants as to cause it to fall.

The bill is verified by complainant, and it prays that defendants may be temporarily as well as permanently enjoined from permitting waters to go into the trench and from maintaining the trench; that defendants may be required to fill the trench and replace the same in the condition which it was prior to making the excavation, and for other and further relief.

The injunction was granted without notice. It is a temporary injunction, as stated in the order. While it is true it does not run for any definite time, it is in express terms provided that the injunction shall remain in force until

otherwise ordered by the court, which is the usual order in all cases of temporary injunctions.

The purpose of the injunction was to maintain the status quo and prevent, until a hearing could be had upon the merits, further injury to the building of complainant.

It is quite true that an injunction will not be granted without notice to defendants unless there is a grave emergency which will entail irreparable injury, which must be made to affirmatively appear by averments in the bill or affidavit in support thereof; and, as held in Krin v. Craig, 135 Ill. App. 301, such an injunction will not be granted without notice unless it is made to clearly and indisputably appear from facts recited and verified that the rights of the complainant will be unduly prejudiced unless the injunction be granted without notice, and that no presumptions are to be indulged in favor of action without notice. But before such a restraining order may be issued the parties must, on facts stated and sworn to, bring themselves within the exception of the statute. This is the settled law in this jurisdiction and many cases so holding might be cited.

We think the facts stated in the verified bill bring complainant within the rule as above stated. The facts averred in the bill to the effect that owing to the digging of the trench and filling it with water, the exposure of the foundation and walls of complainant's building and the malevolence of defendants' purpose and the danger which might naturally be expected to follow from the freezing of the water in the trench, which was likely to occur during the month of December, are facts from which the emergency of the situation was apparent and the necessity of prompt action to avert irreparable injury to complainant's

property made manifest.

Defendants argue that the bill seeks no relief by way of compelling the replacing of any soil which had been removed by them. The fact is that the prayer of the bill is inter alia that defendants may be required to fill the trench and replace same in the condition which it was prior to making the excavation.

Again, counsel argue that "this court might take judicial notice of the mildness of the winter." If it might, it would naturally follow that such notice might be extended to knowledge of the fact that in this latitude severe freezing weather is often experienced in the month of December, which would be another reason for prompt action.

The record considered, we are of the opinion that the averments of fact in the bill sufficiently state a case which, under the statutes and decisions relating to the granting of an injunction without notice, justified the Chancellor in granting the temporary injunction prayed without notice, from which order this appeal is prosecuted. Therefore the injunctional order appealed from is affirmed.

AFFIRMED.

Dover and McSurely, JJ., concur.

392 - 26566

(1584c)

J. FLAXMAN,
Appellee,

vs.

EUGENE MULLANEY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

220 I.A. 659

PER CURIAM.

Appellee has come into court and in writing confessed that in the record and proceedings and in the rendering of the judgment appealed from there is manifest error to the prejudice of appellant. Both appellee and appellant have filed herein their stipulation in writing, by their respective counsel, agreeing that for such error the judgment of the Municipal court may be reversed without costs and without remanding the cause, and it is so ordered.

REVERSED WITHOUT REMANDING.

(1584a)

228 - 26888.

LORENZO M. KEITH,
Appellee,
vs.
CITY OF CHICAGO, etc.,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

220 I.A. 650[4]

OPINION PER CURIAM.

The appellee has filed in this cause a confession of errors as to the amount of the judgment, and has also filed a remittitur of $500 from the amount of said judgment, and all the parties to the cause have stipulated in writing that for the errors so confessed, the judgment is affirmed for the sum of $2250, and the clerk of the Superior court is directed to satisfy the judgment upon the payment of the sum of $2250 with costs.

JUDGMENT AFFIRMED FOR $2250.

6

R. H. denied apr 6, 1921.
(Certiorari denied) (1580 e)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

~~Hon. JOHN M. NIEMAUS~~, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on NOV [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6848. Agenda 26.

People of State of Illinois, ex rel
Patrick Flaherty,
defendant in error,

vs. Error to Bureau County.

Peter Barto and Adolph Butterwick,
plaintiffs in error.

Per curiam.

This is a writ of error to the circuit court of Bureau county sued out by plaintiffs in error, Barto and Butterwick, by which they seek to reverse a judgment of said court convicting said plaintiffs in error of unlawfully usurping the offices of trustees of shools of the Township of Hall in said county, and ousting them from said offices and fining each of them $1.00 with the costs. The term of the vacancy to which Butterwick claimed to have been elected expired in April, 1918, and the term of office to which Barto claimed to have been elected expired April, 1920. The judgment was entered in October, 1919, and was therefore before the expiration of Barto's term and after the expiration of Butterwick's term. They asked an appeal to the supreme court which was allowed them, but it seems not to have been perfected. The precipe for this writ of error was filed in this court September 14, 1920, long after the expiration of the terms of office of said plaintiffs in error. We held in People ex rel, vs. Rose, 81 Ill. App. 387, where the term when relief could be accorded to plaintiffs in error or appellant had passed the question became a purely academic one, and under such circumstances there was no reason for considering the question upon its merits when a decision either way can not benefit the parties. It was held in Wendell vs. City

Jan. 13, 1922. Appeal No.

People of State of Illinois, ex rel
Patrick Flaherty,
defendant in error,

vs. Error to Bureau County.

Peter Barto and Adolph Butterwick,
plaintiffs in error.

Per curiam.

This is a writ of error to the circuit court of Bureau county sued out by plaintiffs in error, Barto and Butterwick, by which they seek to reverse a judgment of said court convicting said plaintiffs in error of unlawfully usurping the offices of trustees of schools of the Township of Hall in said county, and ousting them from said offices and fining each of them $1.00 with the costs. The term of the agency to which Butterwick claimed to have been elected expired in April, 1919, and the term of office to which Barto claimed to have been elected expired April, 1920. The judgment was entered in October, 1919, and was therefore before the expiration of Barto's term and after the expiration of Butterwick's term. They asked an appeal to the supreme court which was allowed them, but it seems not to have been perfected. The praecipe for this writ of error was filed in this court September 14, 1920, long after the expiration of the terms of office of said plaintiffs in error. We held in People ex rel. vs. Rose, 81 Ill. App. 387, where the term when relief could be accorded to plaintiffs in error or appellant had passed the question became a purely academic one, and under such circumstances there was no reason for considering the question upon its merits when a decision either way can not benefit the parties. It was held in Wendell vs. City

of Peoria, 274 Ill. 613, that courts will not occupy themselves with moot cases and cases which do not involve the establishment of a right in controversy between the parties; and such a case is a moot case if no substantial rights are involved. There are many cases in the supreme and appellate courts of this state to the same effect. A reversal now of the judgment of the court below will not restore plaintiffs in error to the offices from which they claim to have been unlawfully ousted, as their terms had expired before this writ of error was sued out.

The writ of error is therefore dismissed.

of Peerio, 17 Ill. 613, that courts will not occupy themselves with moot cases and cases which do not involve the establishment of a right in controversy between the parties; and such a case is a moot case if no substantial rights are involved. There are many cases in the supreme and appellate courts of this state to the same effect. A reversal now of the judgment of the court below will not restore plaintiffs in error to the offices from which they claim to have been unlawfully ousted, as their terms had expired before this writ of error was sued out.

The writ of error is therefore dismissed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 12th day of October, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

6835 (1586a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Carl A. Peterson, appellee,)
)
vs.) Appeal from Knox.
)
James Hoben, appellant.)

DIBELL, P. J.

Hoben sold Peterson a second-hand automobile and gave a bill of sale which contained a warranty as follows:
"Said car at this time is in good running order and mechanically sound."
Peterson claimed that he very soon discovered that the car did not fulfill that warranty, and he brought this suit to recover damages for said breach of warranty, and on a jury trial he had a verdict and a judgment for $220, from which defendant below appealed. We affirmed the judgment and afterwards granted a re-hearing.

Several errors are assigned, but only one is argued, namely, that the court erred in not granting a new trial because the evidence did not support the verdict. All other assignments are waived. The court instructed the jury at the request of the defendant that in order for plaintiff to recover, he must show by a preponderance of the evidence that at the time of the sale and delivery of said automobile, it was not in good running order or was not mechanically sound. We must assume that the jury obeyed that instruction and that they found that the preponderance of the evidence showed that it was not at that time in good running order or was not mechanically sound. Since the case was submitted on the re-hearing we have read all the evidence in the record itself. We are satisfied that the jury were warranted in finding that the evidence introduced by plaintiff made a case for plaintiff and justified the amount of damages awarded. That evidence tended to show that the car had been newly painted by

[illegible]

[illegible] A. Patterson, appellee,

vs. } Appeal from Knox.

James Doran, appellant.

*

GREER, P. J.

Doran sold Patterson a second-hand automobile and gave a bill of sale which contained a warranty as follows:

"Card set at this time is in good running order and mechanically sound."

Patterson alleges that he very soon discovered that the car did not fulfill this warranty, and he brought this suit to recover damages for said breach of warranty, and on a jury trial he had a verdict and a judgment for $[illegible]. From which defendant [illegible] appealed. We affirmed the judgment and defendant's counsel a re-hearing.

Several errors are assigned, but only one is argued, namely, that the court erred in not granting a new trial because the evidence did not support the verdict. All other assignments are waived. The court instructed the jury at the request of the defendant that in order for plaintiff to recover, he must show by a preponderance of the evidence that at the time of the sale and delivery of said automobile, it was not in good running order or was not mechanically sound. We must assume that the jury obeyed that instruction and that they found that the preponderance of the evidence showed that it was not at that time in good running order or was not mechanically sound. Since the case was submitted on the re-hearing we have read all the evidence in the record itself. We are satisfied that the jury were warranted in finding that the evidence introduced by plaintiff made a case for plaintiff and justified the amount of damages awarded. That evidence showed to show that the car had been newly painted by

defendant shortly before the sale to plaintiff, so that it appeared well, but that the starter would not work, the engine could only start on two cylinders, the armature and brushes and generator were worn out, the transmission housing was broken, the gears were stripped, and the universal cap was off with no leather on it. Defendant introduced evidence tending to show that a part at least of these imperfections did not exist at the time of the sale, but were caused afterwards by the unskilful manner in which plaintiff operated the car. This raised a question of fact for the jury. Witnesses called by defendant contradicted defendant in more than one particular, and before he closed his case he took the stand for the third time and altered his testimony in some respects. The jury evidently believed the testimony introduced by plaintiff. They may have been led to discredit defendant's witnesses by the contradictions we have referred to. Defendant had more witnesses than plaintiff. The preponderance of evidence does not necessarily depend entirely upon the number of witnesses testifying upon each side. West Chicago St. Ry. Co. v. Liesenwitz, 197 Ill. 607; No. Chgo. St. Ry. Co., v. Anderson, 176 Ill. 635; Chytraus v. City of Chicago, 100 Ill. 18. If the jury had found for defendant and the trial judge had approved that finding, a judgment for defendant could not have been disturbed here for the lack of evidence. But the jury and the trial judge believed the proof introduced by plaintiff. We conclude the jury might reasonably believe the proof introduced by plaintiff instead of the proof introduced by defendant on the material question of the condition of the car at the time the warranty was given. We see no reason to believe that another jury would reach a different conclusion. It would unduly extend this opinion to set out the testimony of each witness. We are disposed to believe that the jury reached the right conclusion.

defendant merely before the sale to plaintiff, or that it arrived well, but that the electric wheel was not work, the engine could only start as the cylinders, the generator and engine and generator were worn out, the transmission running was broken, the gears were stripped, and the universal joint was off also no lubricant on it. Defendant introduced evidence tending to show that a part of some of these imperfections did not exist at the time of the sale, but were caused afterwards by the unskillful manner in which plaintiff operated the car. This raised a question of fact for the jury. Witnesses called by defendant contradicted defendant in some than one particulars, and testimony of closed kit could be took the stand for the right him and after- at the testimony of each witness. The jury evidently believed the testimony introduced by plaintiff. They may have been led to disregard defendant's testimony by the contradictions we have referred to. Defendant had more witnesses than plaintiff. The preponderance of evidence does not necessarily depend entirely upon the number of witnesses testifying upon each side. Fact Dunlop St. Ry. Co. v. Lissenwitz, 187 Ill. 807; Mo. Cyc. St. Ry. Co., v. Anderson, 174 Ill. 317; Chicago v. City of Chicago, 190 Ill. 18. If the jury had found for defendant and the trial judge had approved that finding, a judgment for defendant would not have been disturbed here for the lack of evidence. But the jury and the trial judge believed the proof introduced by plaintiff. We conclude the jury as it reasonably believe the proof introduced by plaintiff rather at the proof introduced by de- fendant as the material question of the condition of the car at the time the warranty was given. We see no reason to believe that another jury would reach a different conclusion. It would unduly extend this opinion to set out the testimony of each witness. We are disposed to believe that the jury received the

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, ~~CHRISTOPHER X. DUFFY~~ JUSTUS L. JOHNSON Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 12th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson
Clerk of the Appellate Court.

6847 (1587a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

220 I.A. 660 2

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Albert E. Maguire, appellee,	
vs.	Appeal from McDonough.
Clough-Reihm Company, appellant.	

DIBELL, P. J.

The Clough-Reihm Company had a place of business in Quincy and a branch in Macomb. It wished to erect a brick building at Quincy, it to furnish the material and scaffolding. It employed Maguire, a contractor at Macomb, to do the work. He did the work and claimed there was $2,139.07 due him, while the company claimed that he had agreed to do the work for $500. He brought this action to recover the amount due him and filed a declaration and an affidavit of claim. Defendant filed a plea of non-assumpsit, except as to $500, and a tender of said $500. and attached to said plea an affidavit of merits and a second and finally a third affidavit of merits. There was a jury trial and plaintiff had a verdict and a judgment for the full amount of the claim, from which defendant appeals.

Plaintiff had had one or two conversations with officers of the defendant as to the price at which he would do the work. On a certain day he went to defendant's office and met the secretary of the company, and the secretary sent for the architect who had charge of the erection of the building. Whether the secretary stayed during the interview between the architect and the plaintiff is in dispute, but plaintiff offered during that conversation in defendant's office to do the work for $500, plus the cost. The architect told plaintiff to put that in writing. Plaintiff dictated a paper to defendant's stenographer in the office, and the latter wrote it in typewriting, and plaintiff took away one copy and left the other copy there. Soon thereafter plaintiff was called upon the phone by an officer of defendant, who said to him: "We accept your

Albert E. Maguire, appellee,	
vs.	Appeal from McDonough.
Clough-Heim Company, appellant.	

DIERFIL, P. J.

The Clough-Heim Company had a place of business in Quincy and a branch in Macomb. It wished to erect a brick building at Quincy, it to furnish the material and scaffolding. It employed Maguire, a contractor at Macomb, to do the work. He did the work and claimed there was $3,139.07 due him, while the company claimed that he had agreed to do the work for $800. He brought this action to recover the amount due him and filed a declaration and an affidavit of claim. Defendant filed a plea of non-assumpsit, except as to $800, and a tender of said $800, and attached to said plea an affidavit of merits and a second and finally a third affidavit of merits. There was a jury trial and plaintiff had a verdict and a judgment for the full amount of the claim, from which defendant appeals.

Plaintiff had had one or two conversations with officers of the defendant as to the price at which he would do the work. On a certain day he went to defendant's office and the secretary of the company, the secretary and the architect were the sole witnesses of the transaction of the evening. Neither the secretary stayed during the interview between the architect and the plaintiff is in dispute, but plaintiff swore that during that conversation in defendant's office to do the work for $800, plus the cost. The architect told plaintiff to put that in writing. Plaintiff dictated a paper to defendant's stenographer in the office, and the latter wrote it in typewriting, and plaintiff took away one copy and left the other there. Soon thereafter plaintiff was called upon the phone by an officer of defendant, who said to him: "We accept your

proposition." Plaintiff assumed that this meant the written proposition which he had left in the office of the company, and he did the work. Defendant then claimed that the proposition on which it accepted was to do the work for $500, and refused to pay him any more. The writing was as follows:

"Contract for Brick Work on New Service Station.

> I, A. E. Maguire propose to furnish all labor for the construction of service station 50 x 100 for the sum of Five Hundred Dollars plus cost; the Clough-Reihm Co. to furnish all the materials and scaffolding. Masons $1.00 per hour and common labor $.60 per hour."

The only question raised by the affidavit of claim and the affidavits of merits is whether plaintiff was to do the work for $500. or $500. plus the cost. The very clear preponderance of the evidence favors the plaintiff. It is clear that the architect knew of this written proposition and that it was lodged in and remained in defendant's office, and the jury might fairly believe that the secretary was present at the time and knew the terms of the writing. The claim of the officer who accepted the proposition over the phone is that the proposition he referred to was something which had been said before that time. If plaintiff was to furnish the labor for $500. it is very strange that the wages to be allowed masons and common labor were specified in the proposition. It is an undisputed fact that the proposition in writing in the possession of each party was for $500, plus cost. Several pictures of the building which was erected are in evidence and in the record, and the jury were well warranted in considering that the work of erecting it could not be done for $500., and that experienced business men must have known it. We are well satisfied with the verdict, which supports plaintiff's contention, and do not believe that another jury on the same evidence would find differently.

proposition." Plaintiff claimed that this among the written proposition which he had left in the office of the company, and he did the work. Defendant then claimed that the proposition on which it accepted was to do the work for $800, and refused to pay him any more. The writing was as follows:

"Contract for Brick Work on New Service Station.

1. R. E. Hughes proposes to furnish all labor for the construction of service station 50 x 100 for the sum of Five Hundred Dollars plus cost; the Clough-Heim Co. to furnish all the materials and scaffolding.
Wages $1.00 per hour and common labor $.80 per hour."

The only question raised by the sufficiency of claim and the sufficiency of verdict is whether plaintiff was to do the work for $500. or $800. plus the cost. The very clear preponderance of the evidence favors the plaintiff. It is clear from the circumstances of this written proposition and that it was looked in and remained in defendant's office, and the jury might fairly believe that the secretary was present at the time and knew the terms of the writing. The claim of the officer who accepted the proposition over the phone is that the proposition he referred to was something which had been said before that time. If plaintiff was to furnish the labor for $500. is it very strange that the wages to be allowed masons and common labor were specified in the proposition. It is an undisputed fact that the proposition in writing in the possession of each party was for $800. plus cost. Several pictures of the building which was erected are in evidence and in the record, and the jury were well warranted in concluding that the work of erecting it could not be done for $500. and that additional business was just here begun. It is not satisfactory with the verdict, which supports plaintiff's contention, but to not believe that multiple jury on the same evidence would that difficulty.

Defendant also contends that certain items of cost, claimed by plaintiff, ought not to be allowed. These items were specified and itemized in the copy of account sued on as amounting to $3,139.07, including therein said $500., and in the affidavit of claim it was alleged that that amount was due the plaintiff. The affidavits of merits filed by defendant did not assail the correctness of any of these items or allege that they were items for which defendant was not liable, except that it claimed that plaintiff had agreed to do the work for $500. These affidavits of merits set up no defense to the entire amount except that plaintiff had agreed to do the work for $500. The affidavits of claim and of merits under our present statute constitute a limitation upon the amount plaintiff may recover and upon the defenses which the defendant may assert and prove. Except for the claim that the work was to be done for $500, plaintiff on these affidavits would have been entitled to a judgment for $3,139.07. Redding v. Looney, 208 Ill. App. 413; Miller v. Thomas, 200 Ill. App.125

The judgment is therefore affirmed.

Defendant also contends that certain items of cost, claimed by plaintiff, ought not to be allowed. These items were specified and itemized in the copy of account sued on as amounting to $3,188.07, including storage well $[illegible], and in the affidavit of claim it was alleged that that amount was due the plaintiff. The affidavits of merits filed by defendant did not assail the correctness of any of these items or allege that they were items for which defendant was not liable, except that it claimed that plaintiff had agreed to do the work for $500. These affidavits of merits set up no defense to the entire amount except that plaintiff had agreed to do the work for $500. The affidavits of claim and of merits under our present statute constitute a limitation upon the amount plaintiff may recover and upon the defenses which the defendant may assert and prove. Except for the claim that the work was to be done for $500, plaintiff on the se affidavits would have been entitled to a judgment for $3,188.07. Redding v. Looney, 208 Ill. App. 613; Miller v. Thomas, 200 Ill. App.128

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON ~~CHRISTOPHER XX DUFFY~~, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 12th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson
Clerk of the Appellate Court.

6854 1589

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

John Pumphrey, plaintiff in error, vs. Skandia Furniture Company, defendant in error.	Error to Winnebago.

DIBELL, P. J.

On April 2, 1920, John Pumphrey filed a bill in equity in the circuit court of Winnebago County against the Skandia Furniture Company, a corporation doing business in said county, wherein complainant alleged that many years before he subscribed for five shares of the capital stock of said corporation and paid its par value of $500 therefor and afterwards subscribed for one more share and paid therefor; that he did not remember of ever having had any certificates of said stock, but if he had he could not find them, but that he has never assigned said stock or delivered the same to any one; that the company had never paid him any dividends although it has been prosperous and has paid dividends to others; that the company now claims that he assigned and delivered the stock to someone else, but that this is not true. The bill prayed that he be decreed the owner of said stock and have the books of the corporation made to show that fact and that he have an accounting of the dividends that have been paid and that the dividends be paid to him and that certificates of stock be issued to him. Defendant answered, admitting that complainant did subscribe for such stock in 1892 or 1893, and alleging that certificates were issued to him therefor, and that he sold and transferred the same in 1899, giving details thereof, and that ever since that time he has had no interest in the stock. There was a hearing before the Chancellor, and a decree dismissing the bill for want of equity. This is a writ of error to review that decree.

Complainant testified to subscribing and paying for said

John Pumphrey, plaintiff in error,

vs.

Sheadle Furniture Company,

defendant in error.

Error to Winnebago.

DIXON, J.:

On April 3, 1890, John Pumphrey filed a bill in equity in the circuit court of Winnebago County against the Sheadle Furniture Company, a corporation doing business in said county, wherein complainant alleged that many years before he subscribed for five shares of the capital stock of said corporation and paid its par value of $500 therefor and afterwards subscribed for one more share and paid therefor; that he did not remember of ever having had any certificates of said stock, but if he had he could not find them, but that he has never assigned said stock or delivered the same to any one; that the company had never paid him any dividends although it has been prosperous and has paid dividends to others; that the company now claims that he assigned and delivered the stock to someone else, but that this is not true. The bill prayed that he be decreed the owner of said stock and have the books of the corporation made to show that fact and that he have an accounting of the dividends that have been paid and that the dividends be paid to him and that certificates of stock be issued to him. Defendant answered, admitting that complainant did subscribe for such stock in 1882 or 1883, and alleging that certificates were issued to him therefor, and that he sold and transferred the same in 1889, giving details thereof, and that ever since that time he has had no interest in the stock. There was a hearing before the Chancellor, and a decree dismissing the bill for want of equity. This is a writ of error to review that decree.

Complainant testified to subscribing and paying for said

five shares and said one share, and that he did not remember whether he had certificates for said stock, but that if he did he had lost them; that his wife kept all his papers, and after her death in 1919 he was unable to find said certificates and that he had never sold or assigned the same nor received any dividends thereon. Defendant was unable to produce the cancelled certificates of stock issued to complainant or to show any book entries concerning the same. A witness who had been assistant secretary and had been employed by defendant thirty years testified that the cancelled certificates prior to 1901 could not be found, except one, and that the books up to that time could not be found; that at one time they sold a lot of papers to a junk dealer and she thought he must have taken some of the old books. There is record evidence on the stubs of some certificates of stock which the company had issued, tending to show that Pumphrey at one time held certificate No. 362 for five shares of said stock and that he assigned that and, in lieu of it, certificate No. 599 was issued to J. B. Treat on March 10, 1899; also that complainant at one time owned certificate No. 420, for one share of stock, and that he assigned that, and in lieu thereof certificate No. 615 was issued to Frank S. Darrow on May 25, 1899. Without going into the details of the proof, there is oral evidence that complainant sold the five shares to V. N. Johnson, who in 1899 was an officer of the company, and that Johnson without taking out a certificate, sold that certificate to Treat, and Treat surrendered the certificate and took out a new certificate; that complainant sought to have Johnson help him dispose of said remaining share and that Johnson's recollection is that he did help to consummate such a transaction and that that share was sold to someone, but Johnson did not remember the details; and that Darrow was a lumber salesman with whom

Plys Shares and said one share, and that he did not remember he had certificates for only three, but that if he did he had lost them; that his wife kept all his papers, and after her death in 1919 he was unable to find said certificates and that he had never sold or assigned the same nor received any dividends thereon. Defendant was unable to produce the somewhat verbiferous of about twenty thousand or so also any such evidence concerning the same. A witness who had been assistant secretary and had been employed by defendant thirty years testified that the memoriale certificates prior to 1919 could not be found, except one, and that the book or so that also could not be found; that at one time they sold a lot of stock to a Jack Smith; that he thought he was here twice at the old house. There is recent evidence by the clerk of some certificates of stock which the secretary has issued, testing to show that Kimmerly & Jones Dair certificate No. 1[illegible] for five shares of said stock and that be assigned that and also Dair, certificate No. 1[illegible] was issued to V. H. Frost on July 10, 1920; also that certificate to one Tim Wood certificate No. 400, for one share of stock, and that he transferred, and to Jim Thayer certificate No. [illegible] was issued to Frank A. Barrow on Jan 6, 1920. Without going into the details of the proof, there is equal evidence that complainant sold the five shares to V. H. Johnson, who in 1920 was an officer of the company, and that Johnson without taking out a certificate, sold that certificate to Frost, and Frost surrendered the certificate and took out a new certificate; that complainant sought to have Johnson help him transfer of said remaining share and that Johnson's recollection is that he did help to consummate such a transaction and that that share was sold to someone, but Johnson did not remember the transfer and that Barrow was a lumber salesman with whom

defendant had dealings. Complainant denied that he had ever spoken to C. J. Swenson, superintendent for defendant, but Swenson testified that after complainant stopped working for defendant, which was after he had worked for defendant about two years, complainant talked to Swenson and asked him to buy his stock. This was some 33 years before the witness testified. Swenson testified to having a conversation with Johnson about the fact that complainant wished to sell his stock. Complainant is a very old man and does not know his age with certainty, but says he voted for Stephen A. Douglas in Rockford over 60 years ago, after being naturalized, and that he thinks he was 83 years old when he testified. We think it is obvious that he did have two certificates for this stock and that he did sell them and received pay therefor, and has entirely forgotten the transactions. It is inconceivable that he should allow over 20 years to pass while he was holder of that stock in a going and apparently prosperous concern without seeking to collect any dividends or even inquiring whether any dividends had been declared. It is true that, while Johnson thinks that appellant's name was written on the back of the certificate for five shares, perhaps by his mark only, still defendant cannot prove that fact with certainty and cannot show that his name was on the back of the certificate for one share, and that it should have preserved those cancelled certificates. It is also shown that defendant accepted a surrender of other shares held by other parties, on some of which there was no assignment on the back signed by the holder. We think it obvious that this inability to produce these old certificates was not because they had been wilfully destroyed, and that defendant is not deprived of the right to prove the facts in other ways. We are satisfied from the proofs that the court was justified in finding that the certificates were sold by complainant to other parties and

defendant had destroyed. Complainant denied that he was ever sicken to C. J. Swanson, super-visor for defendant. Mr. Swanson testified that after complainant stopped working for defendant, which was after he had worked for defendant about two years, complainant talked to Swanson and asked him to buy his stock. This was some 23 years before the witness testified. Swanson testified to having a conversation with Johnson about the fact that complainant wished to sell his stock. Complainant is a very old man and does not know his age with certainty, but says he voted for Stephen A. Douglas in Sterling over 23 years ago, after being naturalized, and that he thinks he was 23 years old when he testified. We think it is obvious that he did have the certificates for this stock and that he did sell them and received pay therefor, and has entirely forgotten the transactions. It is inconceivable that he should allow over 23 years to pass while he was holder of this stock in a going and apparently prosperous concern without seeking to collect any dividends or even inquiring whether any dividends had been declared. It is true that, while Johnson thinks that appellant's name was written on the back of the certificate for five shares, perhaps by his mark only, still defendant cannot prove that fact with certainty and cannot show that his name was on the back of the certificate for one share, and that it should have preserved those canceled certificates. It is also shown that defendant accepted a surrender of other shares held by other parties, on some of which there was no assignment on the back signed by the holder. We think it obvious that this insistence to produce these old certificates was not because they had been wilfully destroyed, and that defendant is not deprived of the right to prove the facts in other ways. We are satisfied from the proofs that the court was justified in finding that the certificates were sold by complainant to other parties and

that new certificates were issued to the holders and that complainant has no interest in the corporation.

These certificates appear to have been issued in 1892 or 1893. The bill was filed about 27 years thereafter. Complainant contends that this is not laches, because he did not know the fact that his certificates were lost till about a year before he filed the bill. We think it was laches, not to have taken any steps whatever to obtain dividends or any other recognition for 27 years, and laches for defendant not to have known during all of that time whether he did or did not have certificates of stock in his possession. We are of opinion that laches was a defense to this suit, but it is not necessary to be relied upon because the evidence that complainant parted with his stock in 1899 is sufficient to sustain the decree.

Decree affirmed.

that few certificates were issued to the holders and that complainant has no interest in the corporation.

These certificates appear to have been issued in 1882 or 1883. The bill was filed about 27 years thereafter. Complainant contends that this is not laches, because he did not know the fact that his certificates were lost till about a year before he filed the bill. We think it was laches, not to have taken any steps whatever to obtain dividends or any other recognition for 27 years, and laches for defendant not to have known during all of that time whether he did or did not have certificates of stock in his possession. We are of opinion that laches was a defense to this suit, but it is not necessary to be relied upon because the evidence that complainant parted with his stock in 1882 is sufficient to sustain the decree.

Decree affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON ~~CHRISTOPHER XX DUNN~~, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 12th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson

Clerk of the Appellate Court.

6887 (589a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

John Rouse, Sr., appellee, vs. F.E. Ball Company, appellant	Appeal from County Court of Lake

DIBELL, P. J.

A Studebaker car owned by John Rouse, Sr., and driven by one of his sons and in which the owner and two other sons were riding, was being driven west on Broadway in the City of North Chicago, Lake County, on September 16, 1919, about five o'clock P. M. , when an open Ford car, owned by F. E. Ball Company, driven by one of its employees and in which was also riding Arthur L. Ball, another employee, was being driven west ahead of said Studebaker car. The Ford car stopped. The driver of the Studebaker immediately set his brakes, and in spite of the brakes it struck the Ford and the forepart of the Studebaker was seriously injured. Rouse brought suit against the company to recover for said injuries before a justice of the peace, and had a judgment thereffor $100, and on appeal to the County Court plaintiff had a verdict for $150. Plaintiff remitted all but $91.50, the total of a bill of particulars he had filed by order of court. Motions for a new trial and in arrest of judgment were denied. Plaintiff had justment for $91.50 and defendant appeals. The errors assigned cover many rulings of the trial court, but the only error argued is on the action of the court in refusing to grant a new trial, it being argued that the evidence does not support the verdict and that the verdict was due to the passion and prejudice of the jury.

Defendant was paving streets for the city of North Chicago and had recently paved Broadway. The occasion for stopping the Ford car was that as the car reached the point where it stopped a steam roller owned by defendant was being driven east on the south side of the street and was being taken to a yard

John Rowe, Sr.,

appellee,

vs.

T.E. Ball Company, appellant

} Appeal from County Court of Lake

DIXELL, P. J.

A Studebaker car owned by John Rowe, Sr., and driven by one of his sons and in which the owner and two other sons were riding, was being driven west on Studebaker in the city of North Chicago, Lake County, on September 13, 1912, about five o'clock P. M., when an open Ford car, owned by T. E. Ball Company, driven by one of its employees and in which was also riding Arthur L. Ball, another employee, was being driven west ahead of said Studebaker car. The Ford car stopped. The driver of the Studebaker immediately set his brakes, and in spite of the brakes it struck the Ford and the forepart of the Studebaker was seriously injured. Rowe brought suit against the company to recover for said injuries before a justice of the peace, and had a judgment therefor $100, and on appeal to the County Court plaintiff had a verdict for $150. Plaintiff remitted all but $31.50, the total of a bill of particulars he had filed by order of court. Motions for a new trial and in arrest of judgment were denied. Plaintiff had judgment for $31.50 and defendant appeals. The errors assigned cover many rulings of the trial court, but the only error argued is on the motion of the court in refusing to grant a new trial, it being argued that the evidence does not support the verdict and that the verdict was due to the passion and prejudice of the jury.

Defendant was paving streets for the city of North Chicago and had recently paved Broadway. The occasion for stopping the Ford car was that as the car reached the point where it stopped a steam roller owned by defendant was being driven east on the south side of the street and was being taken to a yard

of defendant to be laid up for the winter, and Arthur Ball, riding in the Ford, wished to give the driver of the steam roller some directions where to store it. Arthur told the driver of the Ford to stop and motioned the driver of the steam roller to stop, and both these cars were stopped. Plaintiff claims that defendant's servants were guilty of negligence in suddenly stopping the Ford car without warning. Defendant claims that plaintiff's car should have been under better control, and that plaintiff could have driven his car between the Ford and the steam roller, and also could have turned north upon the parkway, and also that Arthur Ball held out his hand to the north and that it was negligence for plaintiff's driver not to observe the signal and stop. There is no evidence from which the jury could reasonably have found that plaintiff's car was driven at too high a rate of speed. Arthur Ball in the Ford did give a signal. Neither he nor the driver of the Ford knew that a car was approaching behind them. Neither of them looked back until the Ford stopped. The purpose of the signal was not to warn any one coming behind them. It was solely directed to the driver of the steam roller to cause him to stop. It is the opinion of Arthur that he held his hand out in such a position that it should have been seen and understood by those in the Studebaker. None of those in the Studebaker saw it. It may reasonably be that, as it was only intended as a signal to the driver of the steam roller, Arthur's hand was not exhibited to those coming back of him. The street had recently been paved. Proof for plaintiff was that it had rained that morning and the street was wet and the Studebaker slid upon the pavement. Proof for defendant was that it had not rained for several days and the street was dry. The street between curbs was twenty-one feet wide. Proof for plaintiff was that defendant's car and steam roller were each a considerable distance from the curb and

of defendant to be laid up for the winter, and Arthur Ball, riding in the Ford, wished to give the driver of the steam roller some directions where to store it. Arthur told the driver of the Ford to stop and motioned the driver of the steam roller to stop, and both these cars were stopped. Plaintiff claims that defendant's servants were guilty of negligence in suddenly stopping the Ford car without warning. Defendant claims that plaintiff's car should have been under better control, and that plaintiff could have driven his car between the Ford and the steam roller, and also could have turned north upon the parkway, and also that Arthur Ball held out his hand to the north and that it was negligence for plaintiff's driver not to observe the signal and stop. There is no evidence from which the jury could reasonably have found that plaintiff's car was driven at too high a rate of speed. Arthur Ball in the Ford did give a signal. Neither he nor the driver of the Ford knew that a car was approaching behind them. Neither of them looked back until the Ford stopped. The purpose of the signal was not to warn any one coming behind them. It was solely directed to the driver of the steam roller to cause him to stop. It is the opinion of Arthur that he held his hand out in such a position that it should have been seen and understood by those in the Studebaker. None of those in the Studebaker saw it. It may reasonably be that, as it was only intended as a signal to the driver of the steam roller, Arthur's hand was not exhibited to those coming back of him. The street had recently been paved. Proof for plaintiff was that it had rained that morning and the street was wet and the Studebaker slid upon the pavement. Proof for defendant was that it had not rained for several days and the street was dry. The street between curbs was twenty-one feet wide. Proof for plaintiff was that defendant's car and steam roller were each a considerable distance from the curb and

plaintiff's car could not have passed around the Ford car. Proof for defendant was that the Ford and the steam roller were each within one or two inches of the curb and that there was plenty of room for the Studebaker to be driven between them, and that a Garford truck, operated by defendant, came up from the east shortly after the collision and before any of the other cars had moved and slowly passed between them. Proof for plaintiff was that the Garford truck did come up but did not pass until some of the other cars had been removed. If there was such a space between the Ford and the steam roller, that is not conclusive that the Studebaker should have been turned into the middle of the street. The Studebaker was directly behind the Ford and to make that turn it would have had to pass diagonally to the south west to reach the middle of the street and might have been in danger of striking the steam roller. Proof for defendant was that the parkway north of the north curb was in such a condition that plaintiff could have turned north upon it to avoid the collision. Proof for plaintiff was that the parkway had not been completed and that the Studebaker could not have been driven upon it. All these were questions of fact which the jury have determined in favor of plaintiff. Each side claims that it had the preponderance of the evidence on these subjects and criticises the evidence of the opposite side. We have carefully read all the evidence in the record itself. We see no ground on which it can reasonably be contended that the jury should have found the other way or that another jury would be likely to do so. The present statute, requiring warning to be given by the driver of such a car before stopping it on a public street, was not then in force, and the driver of the Ford car was only bound to use that degree of care which a reasonable person would ordinarily exercise under

plaintiff's car would not have passed around the Ford car. Proof for defendant was that the Ford and the steam roller were seen within one or two inches of the curb and that there was plenty of room for the Studebaker to be driven between them, and that a Garford truck, operated by defendant, came up from the east shortly after the collision and before any of the other cars had moved and slowly passed between them. Proof for plaintiff was that the Garford truck did come up but did not pass until some of the other cars had been removed. If there was such a space between the Ford and the steam roller, that is not conclusive that the Studebaker should have been turned into the middle of the street. The Studebaker was directly behind the Ford and to make that turn it would have had to pass laterally to the south west to reach the middle of the street and might have been in danger of striking the steam roller. Proof for defendant was that the parkway north of the north curb was in such a condition that plaintiff could have turned north upon it to avoid the collision. Proof for plaintiff was that the parkway had not been completed and that the Studebaker could not have been driven upon it. All these were questions of fact which the jury have determined in favor of plaintiff. Each side claims that it had the preponderance of the evidence on these subjects and criticises the evidence of the opposite side. We have carefully read all the evidence in the record itself. We see no ground on which it can reasonably be contended that the jury should have found the other way or that another jury would be likely to do so. The present statute, requiring warning to be given by the driver of such a car before stopping it on a public street, was not then in force, and the driver of the Ford car was only bound to use that degree of care which a reasonable person would ordinarily exercise under

like circumstances. But it is obvious that to stop a car suddenly on a main business street of the city could be negligence before the adoption of the statute referred to.

Because of a change in plaintiff's business his car was not repaired till shortly before the trial in the county court. He sought to show the cost of these repairs. That proof was kept out by the objection of defendant. Plaintiff then proved over defendant's objection by a son of plaintiff, whose business it was to make such repairs, that he examined the car shortly after the collision and made a careful estimate of what it would cost to make the repairs and gave his father the figures for which he would do the work and supply the broken parts, and that he gave his father a very low price because it was his father, and that the price he named and to which he testified was based on his knowledge and experience, and that it would have cost that to make the repairs then. As defendant by its objection had kept out proof of what the repairs did cost, we think it should not be heard to object to the proof which the court did admit.

Appellant argues that because the jury allowed $150 and plaintiff admitted he was only entitled to $91.50, therefore the jury were actuated by passion and prejudice against defendant and a new trial ought to follow. The jury may have supposed that they could allow plaintiff for the loss of the use of his car. Plaintiff could not recover for that, for one reason, because it was not included in the bill of particulars. The amount of the judgment is based upon positive testimony as to the amount required to repair the damage and we do not think that the fact that the verdict exceeded that amount should require a new trial in this case, after the excess in the verdict had been remitted.

The judgment is therefore affirmed.

like circumstances. But it is obvious that to stop a car suddenly on a main business street of the city could be negligence before the adoption of the statute referred to.

Because of a change in plaintiff's business his car was not repaired till shortly before the trial in the county court. He sought to show the cost of these repairs. That proof was kept out by the objection of defendant. Plaintiff then proved over defendant's objection by a son of plaintiff, whose business it was to make such repairs, that he examined the car shortly after the collision and made a careful estimate of what it would cost to make the repairs and gave his father the figures for which he would do the work and supply the broken parts, and that he gave his father a very low price because it was his father, and that the price he named and to which he testified was based on his knowledge and experience, and that it would have cost that to make the repairs then. As defendant by its objection had kept out proof of what the repairs did cost, we think it should not be heard to object to the proof which the court did admit.

Appellant argues that because the jury allowed $150 and plaintiff admitted he was only entitled to $21.50, therefore the jury were actuated by passion and prejudice against defendant and a new trial ought to follow. The jury may have supposed that they could allow plaintiff for the loss of the use of his car. Plaintiff could not recover for that, for one reason, because it was not included in the bill of particulars. The amount of the judgment is based upon positive testimony as to the amount required to repair the damage and we do not think that the fact that the verdict exceeded that amount should require a new trial in this case, after the excess in the verdict had been remitted.

The judgment is therefore affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss.

I, ~~CHRISTOPHER C. DUFFY~~ JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 12th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson

Clerk of the Appellate Court.

6891 (590a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Short & Zook, Appellees	)	
vs.	)	Appeal from the County Court
Thomas Mulcahey, Appellant	)	of Peoria County.

DIBELL, P. J.

Short & Zook, real estate dealers, sued Mulcahey to recover an alleged agreed sum for services in procuring a purchaser for his farm, to whom he refused to sell the property. Upon a jury trial plaintiffs had a verdict and a judgment for $600, from which defendant appeals.

Most of the errors assigned are not argued. Appellant contends that the court erred in permitting proof for appellee that the agreement was that the down payment of $1000 could be paid either in cash or by a good check, and that the court erred in permitting appellees to amend their declaration after verdict so as to charge that it was agreed that the down payment might be by a good check. The record is not in the condition appellant supposes. The original declaration, as contained in the record before us, alleges that the down payment was to be "$1000 cash in hand or a good check for that amount." There is a motion by plaintiffs copied into the record by the clerk for leave to amend their declaration, and a separate paper filed which purports to be an amendment of the declaration, but there is no leave of court to amend. The preponderance of the evidence on the subject is that it was agreed that the down payment of $1000 might be made by cash or a good check, and there is unlisputed evidence that the check which was tendered was good, and that the drawer of the check had im bank several thousand dollars with which to meet it. The jury were warranted in finding that that check was within the contract and was good.

But if the case stood as appellant supposes, that the de-

Short & Book, Appellees va. Thomas Malsbary, Appellant	Appeal from the County Court of Pontiac County.

DIXELL, P. J.

Short & Book, real estate dealers, sued Malsbary to recover an alleged agreed sum for services in procuring a purchaser for his farm, to which he refused to sell the property. Upon a jury trial plaintiffs had a verdict and a judgment for $[illegible], from which defendant appeals.

Most of the errors assigned are not argued. Appellant contends that the court erred in instructing for appellee that the agreement was that the down payment of $1000 could be paid either in cash or by a good check, and that the court erred in permitting appellees to amend their declaration after verdict so as to charge that it was agreed that the down payment might be by a good check. The record is not in the condition appellant supposes. The original declaration, as contained in the record before us, alleges that the down payment was to be "$1000 cash in hand or a good check for that amount." There is a motion by plaintiffs copied into the record by the clerk for leave to amend their declaration, and a separate paper filed which purports to be an amendment of the declaration, but there is no leave of court to amend. The preponderance of the evidence on the subject is that it was agreed that the down payment of $1000 might be made by cash or a good check, and there is uncontradicted evidence that the check which was tendered was good, and that the drawer of the check had in bank several thousand dollars with which to meet it. The jury were warranted in finding that that check was within the contract and was good.

But if the case stood as appellant supposes, that the de-

claration averred the down payment was to be cash, still the abstract does not show that defendant objected to testimony that a good check would be accepted; and that testimony being in the record, it was entirely proper for the court to permit the declaration to be amended after verdict to insert that allegation to meet the proof. Out statute as to amendments and jeofails, in force at least since 1874, expressly authorizes such an amendment at any time before final judgment. Our practice act, at least since 1874, has had an express provision permitting such an amendment to conform to proofs already heard. The statute has been frequently approved and applied by the supreme court of this state, and sometimes in cases almost exactly like the case at bar. McCollom vs. I. & St. L. R. R. Co., 84 Ill. 534; Independent Order of Mutual Aid vs. Paine, 122 Ill. 625; Milwaukee Mechanics Insurance Co. vs. Schallman, 180 Ill. 213.

These are the only respects in which the action of the court below is questioned. We find no error in said rulings.

The judgment is therefore affirmed.

alteration starred the down payment was to be paid, still the abstract does not show that defendant objected to testimony that a good claim would be accepted; and that testimony being in the record, it was entirely proper for the court to permit the declaration to be amended after verdict to insert that allegation to meet the proof. Out statute as to amendments and jeofails, in force at least since 1874, expressly authorizes such an amendment at any time before final judgment. Our practice act, at least since 1874, has had an express provision permitting such an amendment to conform to proofs already heard. The statute has been frequently approved and applied by the supreme court of this state, and sometimes in cases almost exactly like the case at bar. McMillan vs. I. & M. R. R. Co., 34 Ill. 324; Independent Order of Mutual Aid vs. Paine, 124 Ill. 688; Milwaukee Mechanics Insurance Co. vs. Robertson, 130 Ill. 213.

These are the only reasons in which the action of the court below is questioned. We find no error in said rulings.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 12th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson

Clerk of the Appellate Court.

6844 (59/9)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6844 Ag. 2.

Milton D. Covert, Appellant, vs. Rockford & Interurban Railway Company, a Corporation. Appellee.	Appeal from Winnebago

Heard, J.

This is a suit brought by appellant against appellee to recover for personal injuries sustained by appellant by being struck by an interurban car of appellee.

The declaration consisted of three counts. The first count charged general negligence in the management, control and operation of the car; the second count charged wilful and wanton negligence and the third count charged a failure to ring a bell or blow a whistle as the car approached the crossing. Appellee plead the general issue. Upon the trial at the conclusion of appellant's evidence the court instructed the jury to find the defendant not guilty. A verdict was returned in accord with the instruction. Motion for new trial was overruled and judgment rendered on the verdict, from which judgment this appeal was taken.

It is claimed by appellant that the court erred in instructing the jury to find the defendant not guilty. Appellant lived in the city of Rockford, and on Labor day, in September, 1916, he went on an interurban car to visit a friend, who lived about a hundred rods north of Radke's crossing on the interurban line of the defendant company, and remained in the country until evening.

Radke's crossing is about three miles east of the city of Rockford and a public road crosses the tracks of the defendant company at said crossing. The public highway there is sixty-three feet wide. There is a wire fence on each side of the

Milton D. Covert, Appellant, vs. Rockford & Interurban Railway Company, a Corporation, Appellee.	Appeal from Winnebago

Hurd, J.

This is a suit brought by appellant against appellee to recover for personal injuries sustained by appellant by being struck by an interurban car of appellee.

The declaration consisted of three counts. The first count charged general negligence in the management, control and operation of the car; the second count charged wilful and wanton negligence and the third count charged a failure to ring a bell or blow a whistle as the car approached the crossing. Appellee placed the general issue. Upon the trial at the conclusion of appellant's evidence the court instructed the jury to find the defendant not guilty. A verdict was returned in accord with the instruction. Motion for new trial was overruled and judgment rendered on the verdict, from which judgment this appeal was taken.

It is claimed by appellant that the court erred in instructing the jury to find the defendant not guilty. Appellant lived in the city of Rockford, and on Labor day, in September, 1910, he went on an interurban car to visit a friend, who lived about a hundred rods north of Radke's crossing on the interurban line of the defendant company, and remained in the country until evening.

Radke's crossing is about three miles east of the city of Rockford and a public road crosses the tracks of the defendant company at said crossing. The public highway there is sixty-

public highway at the crossing, but there is no platform or station of any kind built for the use of passengers in getting on or off interurban cars.

Appellant had travelled over this line on many occasions, -more than a dozen times,- and had gotten off at this same crossing and had boarded the interurban cars there to return to Rockford. A conductor on this run told him that when he wanted to board the car in the evening, after dark that he should light a match or paper, and hold it up on the west side of the highway so that the motoneer could see the light, because if he did not, the motoneer, in all probability, would leave him and not stop the car. Appellant had done this a great many times at this same point or place. On the evening in question it was half past eight o'clock and it was dark. The appellant was sober and had money with which to pay his fare to Rockford. He desired to board the car then approaching from the east for the purpose of returning to Rockford.

Appellant went to the west side of the public highway about three feet from the south side of the rails of appellee's tracks and about eight feet from the west fence of the public highway.

It was the custom of appellee to stop its cars, on signal, across the travelled portion of the highway. Sometimes the front end of the car would come up as far west as the place where the appellant was standing, but sometimes it would not come that far. The tracks of appellee were straight for a long distance east with nothing to obstruct the view of appellant.

Appellant saw the car coming about a mile up the track and he lighted a paper and held it up above the tracks in his left hand while he stood about three feet to the south of the south rail of appellee's track facing towards the east. ~~Appellee's~~

public highway at the crossing, but there is no platform or station of any kind built for the use of passengers in getting on or off interurban cars.

Appellant had travelled over this line on many occasions, -once than a dozen times, - and had gotten off at this same crossing and had boarded the interurban cars there to return to Rockford. A conductor on this car told him that when he wanted to board the car in the evening, after dark, that he should light a match or paper, and hold it up on the west side of the highway so that the motorman could see the light, because if he did not, the motorman, in all probability, would have his car not stop the car. Appellant had done this a great many times at this same point or place. On the evening in question it was half past eight o'clock and it was dark. The appellant was going and had money with which to pay his fare to Rockford. He desired to board the car then approaching from the east for the purpose of returning to Rockford.

Appellant went to the west side of the public highway about three feet from the south side of the rails of appellee's tracks and about eight feet from the west fence of the public highway.

It was the custom of appellee to stop its cars, on signal, across the travelled portion of the highway. Sometimes the front end of the car would come up as far west as the place where the appellant was standing, but sometimes it would not come that far. The tracks of appellee were straight for a long distance east with nothing to obstruct the view of appellant.

Appellant saw the car coming about a mile up the track and he lighted a paper and held it up above the tracks in his left hand while he stood about three feet to the south of the south rail of appellee's track facing towards the east. Appellant

Appellee's car was coming from the east in a westerly direction. The wind blew out the lighted paper, which was again lighted by appellant and held up again in his left hand while he was facing towards the east, in the same position that he was in when he first lit the paper and as he held the paper up the second time the headlight on the car blinded him to such a degree that he could not see. The car blew two short whistles which was the usual and customary signal, some two or three hundred feet east of the highway. The two short whistles meant the acknowledgement of a signal to stop and were the customary signal to stop where there was a person signaling. The car did not stop at the crossing. It ran past the crossing at a speed of forty miles per hour and did not stop until it had reached a place about thirteen hundred feet to the west of the place where appellant was standing. The interurban car while going past struck appellant's left hand with which he was holding the lighted paper and wheeled him around, causing his right foot to strike the back step of the car which hung down at the back end of the car. His ankle was crushed and ligaments of the right foot were injured and broken.

And intending passenger who stands so close to a moving car on which he intends to take passage as to be struck is guilty of contributory negligence. McClansland vs. C C Ry. Co. 198 Ill. App. 300. Appellant was guilty of contributory negligence according to his own testimony and therefore could not recover under the first or third counts of the declaration and could only recover under the second count of the declaration if there was some evidence in the case which taken with all the reasonable inferences arising therefrom tended to show that appellee was guilty of wilful negligence.

Appellee's car was coming from the east in a westerly direction. The wind blew out the lighted paper, which was again lighted by appellant and held up again in his left hand while he was facing towards the east, in the same position that he was in when he first lit the paper and as he held the paper up the second time the headlight on the car blinded him to such a degree that he could not see. The car blew two short whistles which was the usual and customary signal, some two or three hundred feet east of the highway. The two short whistles meant the acknowledgement of a signal to stop and were the customary signal to stop where there was a person signaling. The car did not stop at the crossing. It ran past the crossing at a speed of forty miles per hour and did not stop until it had reached a place about thirteen hundred feet to the west of the place where appellant was standing. The interurban car while going past struck appellant's left hand with which he was holding the lighted paper and wheeled him around, causing his right foot to strike the back step of the car which hung down at the back end of the car. His ankle was crushed and ligaments of the right foot were injured and broken.

And intending passenger who stands so close to a moving car on which he intends to take passage as to be struck is guilty of contributory negligence. McClanahand vs. C C Ry. Co. 138 Ill. App. 200. Appellant was guilty of contributory negligence according to his own testimony and therefore could not recover under the first or third counts of the declaration and could only recover under the second count of the declaration if there was some evidence in the case which taken with all the reasonable inferences arising therefrom tended to show that appellee was guilty of wilful negligence.

Wilful negligence consists of something more than a mere negligent omission of duty. A charge of wilful negligence implies an act intentionally done in disregard of another's rights, or the omission of the defendant, after having such notice of another's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding injury to such other. Waldren Express Co. vs. Krug, 291 Ill. 479; C.W.D.Ry.Co. vs. Ryan, 131 Ill. 474; 20 Cyc, 510. The only claim of negligence on the part of appellee found in appellant's brief and argument is that appellee ran its car across the crossing at a high rate of speed after appellee had signalled it to stop. There is no rule of law requiring an interurban car to stop all its cars to take on passengers at all road crossings on signal. Welch vs. Chicago City Ry. Co. 208 Ill. App. 161. Even if there were under the facts of this particular case a failure to so stop would be a mere negligent omission of duty and not wilful or wanton negligence. We find in the record no evidence even tending to show wilful or wanton negligence on the part of appellee and the trial court was therefore right in instructing the jury to find appellee not guilty. The judgment is affirmed.

Wilful negligence consists of something more than a mere negligent omission of duty. A course of wilful misconduct implies an act intentionally done in disregard of another's rights, or the omission of the defendant, after being aware of notice of another's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding injury to such other. Baltimore Traction Co. vs. Trego, 101 Md. 479; C.W.O.Ry.Co. vs. Ryan, 151 Ill. 339; 38 Ore. 810. The only claim of negligence on the part of appellee based on appellant's order and argument is that appellee ran his car across the crossing at a high rate of speed after appellee did signalled it to stop. There is no rule of law requiring an intoxicated car to stop at all its cars to take no chances at all road crossings on signal. Wolon vs. Chicago City Ry. Co. 209 Ill. App. 181. Even if there were under the facts of this particular case a failure to so stop would be a mere negligent omission of duty and not wilful or wanton negligence. We find in the record no evidence ever tending to show wilful or wanton negligence on the part of appellee and the trial court was therefore right in instructing the jury to find appellee not guilty. The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, ~~CHRISTOPHER XXXXXXXXXXXXXXX~~ JUSTUS L. JOHNSON Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 13th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson
Clerk of the Appellate Court.

6858 (1592a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6858 Ag. 47

Frank M. Tomberger, Appellant, vs. Robert K. Swan, Appellee.	)	Appeal from City Court of Moline.

Heard, J.

May 8, 1919, a Buick taxi driven by a chauffeur of appellant collided with a Dodge coupe driven by a chauffeur of appellee, the left front wheel of appellant's car coming in contact with the left rear wheel of appellee's car, at the intersection of 16th street and 13th avenue, in the city of Moline. 13th avenue runs east and west and 16th Street runs north and south. At the time of the collision appellant's car was going north and appellee's car going west. Appellant brought suit against appellee to recover for damages sustained by the Buick taxi, in the original declaration alleging negligence generally, and, in an additional count, alleging that appellee's car was being driven at an excessive rate of speed. Appellee plead not guilty and a trial resulted in a judgment in favor of appellee from which this appeal was taken.

Appellant in his brief says that "the principal dispute arises over the rate of speed at which the two automobiles were going and the question of which car first reached the intersection"

The testimony of appellant's chauffeur tends to show that Appellant's car was being driven north on the east side of 16th street at a rate of speed of between 12 and 15 miles per hour, that the speed was lessened as the car approached 13th avenue and that the Swan car was about 20 feet east of the east curb line of 16th street, coming at a rate of speed of 24 to 40 miles per hour, when appellant's car reached the intersection.

Frank M. Tomberger, Appellant, vs. Robert E. Swan, Appellee.	Appeal from City Court of Moline.

Ward, J.

May 8, 1919, a Buick taxi driven by a chauffeur of appellant collided with a Dodge coupe driven by a chauffeur of appellee, the left front wheel of appellant's car coming in contact with the left rear wheel of appellee's car, at the intersection of 16th street and 13th avenue, in the city of Moline. 13th avenue runs east and west and 16th street runs north and south. At the time of the collision appellant's car was going north and appellee's car going west. Appellant brought suit against appellee to recover for damages sustained by the Buick taxi, in the original declaration alleging negligence generally, and, in an additional count, alleging that appellee's car was being driven at an excessive rate of speed. Appellee plead not guilty and a trial resulted in a judgment in favor of appellee from which this appeal was taken.

Appellant in his brief says that "the principal dispute arises over the rate of speed at which the two automobiles were going and the question of which car first reached the intersection."

The testimony of appellant's chauffeur tends to show that Appellant's car was being driven north on the east side of 16th street at a rate of speed of between 12 and 15 miles per hour, that the speed was lessened as the car approached 13th avenue and that the Swan car was about 20 feet east of the east curb line of 16th street, coming at a rate of speed of 24 to 40 miles per hour, when appellant's car reached the intersection.

He is corroborated by his passenger who was injured in the collision and has a personal injury claim against appellee.

Appellee's chauffeur's testimony tends to show that appellee's car was being driven west on the north side of 13th avenue at a rate of speed of 14 or 15 miles an hour and, when passing 16th street and 13th avenue, at a rate of speed of from 9 to 10 miles per hour; that appellee's car was 8 or 10 feet from the east curb line of 16th street, when appellee's driver saw appellant's car which was then at a point about 35 or 40 feet from the curb line of 13th avenue, coming at a rate of speed of between 25 and 30 miles an hour, and that appellee's car reached the intersection first. He is corroborated somewhat by the positions in which the cars were after the collision. These three were the only eye witnesses who testified.

These questions were purely questions of fact for the jury who saw and heard the witnesses and we would not be justified in disturbing their find.

On the motion for new trial appellant filed an affidavit of Mrs. Bertha Thorpe who said that she saw appellee's car immediately prior to the collision and that at the time she saw the car it was going not less than 25 miles per hour. The affidavit does not state where the car was at the time she saw it. Appellant also filed the affidavit of Paul Stange that he saw the collision and that appellant's car was not going at a faster rate of speed than 15 miles per hour and that appellee's car was going about 30 miles per hour. With these affidavits was filed appellant's affidavit in which he stated that he had no knowledge that Mrs. Bertha Thorpe or Paul Stange knew anything about the facts of the case until after the trial and that he used due diligence in attempting to discover any and all evidence previous to the trial.

It is urged by appellant that the court should have granted

He is corroborated by his passenger who was injured in the collision and has a personal injury claim against appellee.

Appellee's conflicting testimony tends to show that appellee's car was being driven west on the north side of 13th avenue at a rate of speed of 14 or 15 miles an hour and, when reaching 16th street and 13th avenue, at a rate of speed of from 9 to 10 miles per hour; that appellee's car was 8 or 10 feet from the east curb line of 16th street, when appellee's driver saw appellant's car which was then at a point about 35 or 40 feet from the curb line of 13th avenue, coming at a rate of speed of between 25 and 30 miles an hour, and that appellee's car reached the intersection first. He is corroborated somewhat by the positions in which the cars were after the collision. These three were the only eye witnesses who testified.

These questions were purely questions of fact for the jury who saw and heard the witnesses and we would not be justified in disturbing their find.

On the motion for new trial appellant filed an affidavit of Mrs. Bertha Thorpe who said that she saw appellee's car immediately prior to the collision and that at the time she saw the car it was going not less than 25 miles per hour. The affidavit does not state where the car was at the time she saw it. Appellant also filed the affidavit of Paul Stange that he saw the collision and that appellant's car was not going at a faster rate of speed than 15 miles per hour and that appellee's car was going about 30 miles per hour. With these affidavits we filed appellant's affidavit in which he stated that he had no knowledge that Mrs. Bertha Thorpe or Paul Stange knew anything about the facts of the case until after the trial and that he used due diligence in attempting to discover any and all evidence previous to the trial.

It is urged by appellant that the court should have granted

a new trial on the ground of newly discovered evidence. Appellant's affidavit as to diligence did not meet the requirements of the law. The affidavit should state the facts which affiant claims constitute due diligence and not merely affiant's conclusion. The court did not err in refusing to grant a new trial on the ground of newly discovered evidence. This evidence was merely cumulative and not conclusive. If it be added to the evidence in the record a jury might still readily conclude therefrom that both parties were guilty of negligence which contributed to bring about the accident in which event appellant could not recover.

A court should not grant a new trial on the ground of newly discovered evidence where it is simply cumulative and inconclusive or where there is no showing or proper diligence to procure the evidence on the trial, Lathrop vs. People 197 Ill. 169. People vs. Wright 187, Ill. 580; People vs. Le Morte 389 Ill. 11. In the latter case it was said, "It has been frequently stated by this court that newly discovered evidence on motion for new trial, must be clearly conclusive in its character to require the court to grant a new trial (Henry vs. People 198, Ill. 162 and cases there cited)"

It is claimed that the court erred in multiplying instructions on the question of due care on the part of the appellant. The court at the request of appellee gave four mandatory instructions directing a verdict for appellee unless appellant was in the exercise of due care and a fifth instruction which purported to define negligence and ordinary care. The practice of requesting a great number of instructions on the same subject is not a proper practice and should be strongly condemned. There is no necessity for repeating the same idea in different instructions, in language varying only in form, Keeler vs. Steeppe, 36 Ill. 311; C. W. & C. V. Co. 210 Ill. 9. When, however, each of the instructions contains a proposition not contained in

a new trial on the ground of newly discovered evidence. Appellant's affidavit as to diligence did not meet the requirements of the law. The affidavit should state the facts which affiant claims constitute due diligence and not merely affiant's conclusion. The court did not err in refusing to grant a new trial on the ground of newly discovered evidence. This evidence was merely cumulative and not conclusive. If it be added to the evidence in the record a jury might still reasonably conclude therefrom that both parties were guilty of negligence which contributed to bring about the accident in which event appellant could not recover.

A court should not grant a new trial on the ground of newly discovered evidence where it is simply cumulative and inconclusive or where there is no showing or proper diligence to procure the evidence on the trial, Lathrop vs. People 187 Ill. 189. People vs. Wright 187, Ill. 580; People vs. Le Motte 339 Ill. 11. In the latter case it was said, "It has been frequently stated by this court that newly discovered evidence on motion for new trial, must be clearly conclusive in its character to require the court to grant a new trial (Henry vs. People 189, Ill. 189 and cases there cited)"

It is claimed that the court erred in multiplying instructions on the question of due care on the part of the appellant. The court at the request of appellee gave four mandatory instructions directing a verdict for appellee unless appellant was in the exercise of due care and a fifth instruction which purported to define negligence and ordinary care. The practice of requesting a great number of instructions on the same subject is not a proper practice and should be strongly condemned. There is no necessity for repeating the same idea in different instructions, in language varying only in form, Wesler vs. Steppe, 81 Ill. 311; C. W. & C. V. Co. 210 Ill. 3. When, however, such

any other, while the court should, if possible, consolidate them by modifying one or more of them, the court would not be justified in refusing such instructions.

Appellant contends that one of the appellant's given instructions was erroneous in that it instructs the jury that, "If the plaintiff was guilty of any negligence that helped to bring about or produce the injury complained of, the plaintiff cannot recover." It is true that the degree of care required of a plaintiff to entitle him to recover is only ordinary care and that a person may be guilty of slight negligence and yet be in the exercise of ordinary care. C. & E. I. R. Co. vs. Randolph 199, Ill. 186. The law is, however, well settled that when a plaintiff is guilty of any negligence, however slight, if that negligence is such that it contributes or helps to bring about an injury, he cannot recover unless the defendant is guilty of wilful or wanton negligence, Krieger vs. A. E. & C. R.R. Co. 242 Ill. 544; City of Macon vs. Holcomb 205, Ill. 643.

The declaration in this case does not charge wilful or wanton negligence. There is no evidence of such negligence and appellant's instructions were not based on the theory of wilful or wanton negligence.

It is contended that one of appellee's given instructions was erroneous in that it told the jury; "one who has suffered damage by the negligence of another cannot recover damages therefor if the injured party by his own negligence approximately contributed to the injury." Standing alone, this certainly would have been reversible error but this language was immediately followed by the following: "so that it would not have happened but for his own fault. If, therefore, you find that the said plaintiff, servant or agent, by his own carelessness,

any other, while the court should, if possible, reconcile them by modifying one or more of them, the court would not be justified in refusing such instructions.

Appellant's instructions 1 and 2 of the defendant's given instructions was erroneous in that it instructs the jury that, "If the plaintiff was guilty of any negligence that helped to bring about or produce the injury complained of, the plaintiff cannot recover." It is true that the degree of care required of a plaintiff to entitle him to recover is only ordinary care and that a person may be guilty of slight negligence and yet be in the exercise of ordinary care. C. & E. I. R. Co. vs. Randolph 189, Ill. 126. The law is, however, well settled that when a plaintiff is guilty of any negligence, however slight, if that negligence is such that it contributes to helps to bring about an injury, he cannot recover unless the defendant is guilty of wilful or wanton negligence. Krieger vs. A. E. & C. R.R. Co. 245 Ill. 544; City of Macon vs. Holcomb 188, Ill. 544.

The declaration in this case does not charge wilful or wanton negligence. There is no evidence of such negligence and appellant's instructions were not based on the theory of wilful or wanton negligence.

It is contended that one of a police's given instructions was erroneous in that it told the jury "one who has suffered damage by the negligence of another cannot recover damages therefor if the injured party by his own negligence contributed to the injury." Standing alone, this certainly would have been reversible error but this language was immediately followed by the following: "so that it would not have happened but for his own fault. If, therefore, you find that the said plaintiff, servant or agent, by his own carelessness,

substantially contributed to the injury, or that he might by the exercise of ordinary care, such as a prudent person generally would have used under similar circumstances, have avoided the injury, he cannot recover damages." Reading the instruction as a whole we do not think that the jury could have been misled thereby.

Complaint is made as to the giving of appellee's 16th and 3rd instruction. The giving of No. 16 has been repeatedly upheld by the courts and while No. 3 is inaccurate it is not erroneous in the respect specified by appellant.

Finding no reversible error in the record the judgment is affirmed.

unnecessarily confounded the inquiry, so that no right by the exercise of ordinary care, such as a prudent person generally would have used under similar circumstances, was avoided the injury, or lessen damages." Taking the instruction as a whole we do not think the jury could have been misled thereby.

Complaint is made as to the giving of appellee's 18th and 3rd instruction. The giving of No. 18 has been repeatedly held by the courts and while No. 3 is inaccurate it is not erroneous in the respect specified by appellant.

Finding no reversible error in the record the judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 12th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson
Clerk of the Appellate Court.

6861 (593a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice,
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6861 Ag. 11

Tillie Rosenthal, Appellee	)	
vs.	)	Appeal from Will
Abraham Berkovitz, Appellant.	)	

Heard, J.

Appellee brought against appellant an action of slander alleging that appellant used language of and concerning her which amounted to charges of larceny and fornication. Appellant filed a plea of the general issue and a special plea which latter plea was withdrawn before trial. A trial resulted in a verdict and judgment for appellee against appellant for $600, from which judgment appellant has appealed to this court.

Appellant urges four grounds for reversal, the first being that appellee failed to prove the speaking of any of the slanderous words in the presence and hearing of any person.

Appellant devotes most of his argument to this point, but for reasons which will be obvious later in the opinion we refrain from discussing it.

Appellant's second contention is that the language and tactics used by appellee's attorney were calculated to, and did, arouse passion and prejudice of a racial character against appellant. In support of this contention appellant filed an affidavit setting forth a portion of appellee's attorney's argument to the jury. It has been repeatedly held that in order to preserve exceptions to remarks of this character they must be made to appear by recital in the bill of exceptions together with the ruling of the judge thereon and that the court will not consider affidavits with reference thereto even

No. 8881 Ag. 11

Willie Tassinari, Appellee, vs. Abraham Berkovitz, Appellant.	Appeal from Will

Hart, J.

Appellee brought against appellant an action of slander alleging that appellant used language of and concerning her which amounted to charges of larceny and fornication. Appellant filed a plea of the general issue and a special plea which latter plea was withdrawn before trial. A trial resulted in a verdict and judgment for appellee against appellant for $600, from which judgment appellant has appealed to this court.

Appellant urges four grounds for reversal, the first being that appellee failed to prove the speaking of any of the slander-ous words in the presence and hearing of any person.

Appellant devotes most of his argument to this point, but for reasons which will be obvious later in the opinion we re-frain from discussing it.

Appellant's second contention is that the language and tactics used by appellee's attorney were calculated to, and did, arouse passion and prejudice of a racial character against appellant. In support of this contention appellant filed an affidavit setting forth a portion of appellee's attorney's argument to the jury. It has been repeatedly held that in order to preserve exceptions to remarks of this character they must be made to appear by recital in the bill of exceptions to-gether with the ruling of the judge thereon and that the court will not consider affidavits with reference thereto even

though the affidavits may appear in the bill of exceptions. Mayer vs. People, 106 Ill. 306; Peterson vs. Pusey, 237 Ill. 204. The matters set forth in appellant's affidavit cannot therefore be considered by us.

Appellant's fourth contention is that the court erred in ruling on the admission of evidence. Appellant urges that questions asked the witness Jacobson were leading and that the court erred in overruling appellant's objections thereto. Appellant's objection was a general objection and therefore only raised the question of competency, relevancy and materiality and did not raise the specific objection now urged.

At the request of plaintiff the court called as court witnesses Robert Grossman and his wife Celia Grossman to whom and in whose presence appellee testified the slanderous words were spoken. After their examination and cross examination by both parties appellant as a part of her case in chief called as a witness for the purpose of impeaching Robert Grossman, Frank G. Brumund, who was formerly an attorney in the suit for appellee but who had withdrawn for the purpose of becoming a witness. The following question was asked him by appellee's attorney: "Q. State whether or not, at that time and place, Robert Grossman told all of us that Abraham Berkovitz had been in his store on or about March 4th, and told Mr. Grossman at that time, in substance that she, (meaning Tillie Rosenthal), the plaintiff, 'was a thief! Did Grossman say that at that time?" Thereupon appellant's attorney said "That is objected to" and the court said "He may answer". The objection now urged to the question is that a prior statement of a witness, in order to be provable for the purpose of impeachment, must be contradictory or inconsistent with his testimony, and that statements of a witness as to matters as to which he has not

though the affidavits may appear in the bill of exceptions. Mayer vs. People, 106 Ill. 306; Peterson vs. Pusey, 327 Ill. 204. The matters set forth in appellant's affidavit cannot therefore be considered by us.

Appellant's fourth contention is that the court erred in ruling on the admission of evidence. Appellant urges that questions asked the witness Jacobson were leading and that the court erred in overruling appellant's objections thereto. Appellant's objection was a general objection and therefore only raised the question of competency, relevancy and materiality and did not raise the specific objection now urged.

At the request of plaintiff the court called as court witnesses Robert Grossman and his wife Celia Grossman to whom and in whose presence appellee testified the slanderous words were spoken. After their examination and cross examination by both parties appellant as a part of her case in chief called as a witness for the purpose of impeaching Robert Grossman, Frank G. Drumund, who was formerly an attorney in the suit for appellee but who had withdrawn for the purpose of becoming a witness. The following question was asked him by appellee's attorney: "Q. State whether or not, at that time and place, Robert Grossman told all of us that Abraham Berkovits had been in his store on or about March 4th, and told Mr. Grossman at that time, in substance that she, (meaning Tillie Rosenthal), the plaintiff, "was a thief! Did Grossman say that at that time?" Thereupon appellant's attorney said "That is objected to" and the court said "He may answer". The objection now urged to the question is that a prior statement of a witness, in order to be provable for the purpose of impeachment, must be contradictory or inconsistent with his testimony, and that statements of a witness as to matters as to which he has not

testified, cannot be shown. This is undoubtedly the law but the witness Grossman when on the stand was specifically asked if he had not made the statement contained in the impeaching question at the time and place and in the presence of the persons designated in the impeaching question. The question was not objectionable on the grounds urged by appellant and the ruling of the court was therefore not reversible error.

While in Carle vs. People 200 Ill. 494, it was held that under proper circumstances the court could at the request of an attorney in the case call a witness as the court's witness, allowing the witness to be cross examined by both parties, and this practice has been recognized since in People vs. Clemenson 280 Ill. 135; People vs. Bernstein 250 Ill. 63; People vs. Baskin 254 Ill. 55; People vs. Rardin 255 Ill. 10; People vs. Fox 269 Ill. 300. Nevertheless in People vs. Bernstein supra it was said that such a practice was not to be commended and in People vs. Clemenson supra it was said that the practice should not be extended beyond the limits of the rule announced in People vs. Clemenson supra, and that the cross examination should be limited to the issues involved and kept within bounds.

We, therefor, do not wish to be understood as holding that it was competent for appellee, under guise of the impeachment of a witness, called by the court, for whose veracity appellant had not vouched and for whose statements made out of court appellant was in no wise responsible, to introduce hearsay statements that appellant at a time and place not alleged in the declaration had made slanderous statements about appellee - Such evidence was clearly prejudicial to appellant.

Appellant's third contention is that the court erred

testified, cannot be shown. This is undoubtedly the law but the witness Crossman when on the stand was specifically asked if he had not made the statement contained in the impeaching question at the time and place and in the presence of the persons designated in the impeaching question. The question was not objectionable on the grounds urged by appellant and the ruling of the court was therefore not reversible error.

While in Carle vs. People 200 Ill. 494, it was held that under proper circumstances the court could at the request of an attorney in the case call a witness as the court's witness, allowing the witness to be cross examined by both parties, and this practice has been recognized since in People vs. Clemenson 250 Ill. 135; People vs. Bernstein 250 Ill. 62; People vs. Lewis 250 Ill. 62; People vs. Parkin 250 Ill. 10; People vs. Fox 250 Ill. 200. Nevertheless in People vs. Bernstein supra it was said that such a practice was not to be commended and in People vs. Clemenson supra it was said that the practice should not be extended beyond the limits of the rule announced in People vs. Clemenson supra, and that the cross examination should be limited to the issues involved and kept within bounds.

We, therefore, do not wish to be understood as holding that it was competent for appellee, under guise of the impeachment of a witness, called by the court, for whose veracity appellant had not vouched and for whose statements made out of court appellant was in no wise responsible, to introduce hearsay statements that appellant at a time and place not alleged in the declaration had made slanderous statements about appellee - Such evidence was clearly prejudicial to appellant.

Appellant's third contention is that the court erred

in the giving and refusing of instructions.

At the request of appellee the court gave to the jury an instruction containing the following:- "The Jury have a right to determine x x x x and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit, and to give credit accordingly." This instruction was condemned in Y.M.C.A. vs. Perrin, 139 Ill. App. 545; People vs. Fox, 269 Ill. 300 and People vs. Terrell 262 Ill. 138; in which latter case the court said that if the guilt of the defendant was doubtful or the case not clear the giving of the instruction might require a reversal of the judgment.

In the present case appellee testified to the speaking of the alleged slanderous words, while appellant denied their speaking and the persons in whose presence appellee claimed such words were spoken, denied hearing them or denied that they were spoken by appellant. It is evident, therefore, that the case is not clear. On the trial appellee's attorney asked a number of questions containing matter damaging to appellant, to which objections were sustained but which were answered by the witness prior to the ruling of the court. In response to improper questions appellee testified that the witness Grossman, who, as a witness had testified in appellant's favor, had advised her to bring this suit. Although these answers were stricken out by the court, these were circumstances appearing on the trial. On the cross examination of Jacob Gowsieow, a witness for appellant, appellee's attorney asked him, "Q. Did you ever write a letter in which you slandered Miss Rosenthal to your sister in New York?", presenting a paper to the witness. The court sustained an objection to the question, but the presentation of the paper to the witness in conjunction with the question

in the giving and refusing of instructions.

At the request of appellee the court gave to the jury an instruction containing the following:- "The jury have a right to determine x x x x and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit, and to give credit accordingly." This instruction was condemned in I.W.C.A. vs. Ferris, 190 Ill. App. 145; People vs. Fox, 254 Ill. 300 and People vs. Terrell 260 Ill. 148; in which latter case the court said that if the guilt of the defendant was doubtful or the mind not clear the giving of the instruction might require a reversal of the judgment.

In the present case appellee testified as to the wording of the alleged slanderous words, while appellant denied their speaking and his certain in which stenograph appellee claimed such words were spoken, denied hearing them or denied that they were spoken by appellant. It is evident, therefore, that the case is not clear. On the trial appellee's attorney asked a number of questions containing matter damaging to appellant, to which objections were sustained but which were answered by the witness prior to the ruling of the court. In response to improper questions appellee testified that the witness Jackson, who, as a witness had testified in appellant's favor, had advised her to bring this suit. Although these answers were stricken out by the court, these were circumstances appearing on the trial. On the cross examination of Jacob Gowalsow, a witness for appellant, appellee's attorney asked him, "Q. Did you ever write a letter in which you slandered Miss Rosenthal to your sister in New York?", presenting a paper to the witness. The court sustained an objection to the question, but the presenta-

was one of the surrounding circumstances appearing on the trial which if the jury were allowed to consider such circumstances would most likely tend to prejudice the jury against the defendants witness. This was a case which demanded accuracy of instructions and this instruction should not have been given.

At the request of appellee the court gave to the jury the following instruction: "The court instructs the jury that all the plaintiff is bound to prove on her part to entitle her to recover in this case is the speaking, by the defendant, of enough of the slanderous words charged in the declaration to amount to a charge of larceny or fornication against the plaintiff; and if the jury believe from the evidence, that the defendant is guilty of speaking enough of the slanderous words, charged in the declaration, of and concerning the plaintiff, or to the plaintiff in the presence of any other person, to amount of a charge of larceny or fornication against the plaintiff, then express malice or ill-will need not be proved. Malice, in its legal sense, means a wrongful act, done intentionally, without just cause or excuse."

Since the basis of an action for slander is damages for the injury to character in the opinion of other men, proof of the publication of the defamatory words is essential to the maintenance of the action and to constitute such proof there must be evidence of communication to some person other than the plaintiff. Frank vs. Kaminsky, 109 Ill. 26; Weise vs. Meissner, 171 Ill. App. 597; Heller vs. Howard, 11 Ill. App. 554. The instruction in question ignores this essential requisite to a recovery and its giving was therefor error.

For the errors in instructions to the jury the cause is reversed and remanded.

was one of the surrounding circumstances comprising or the trial which of the jury were allowed to consider such circumstances would most likely tend to prejudice the jury against the defendant by witness. This was a clear error leading directly of instructions and this instruction should not have been given.

At the request of appellee the court gave to the jury the following instruction: "The court instructs the jury that all the plaintiff is bound to prove on her part to entitle her to recover in this case is the speaking, by the defendant, of enough of the slanderous words charged in the declaration to amount to a charge of larceny or fornication against the plaintiff; and if the jury believe from the evidence, that the defendant is guilty of speaking enough of the slanderous words, charged in the declaration, or and concerning the plaintiff, or to the plaintiff in the presence of any other person, to amount of a charge of larceny or fornication against the plaintiff, then express malice or ill-will need not be proved. Malice, in the legal sense, means a wrongful act, done intentionally, without just cause or excuse."

Since the basis of an action for slander is damages for the injury to character in the opinion of other men, proof of the publication of the defamatory words is essential to the maintenance of the action and to constitute such proof there must be evidence of communication to some person other than the plaintiff. Frank vs. Kemimely, 109 Ill. 26; Weise vs. Meissner, 171 Ill. App. 597; Heller vs. Howard, 11 Ill. App. 554. The instruction in question ignores this essential requisite to a recovery and its giving was therefor error.

For the errors in instructions to the jury the cause is reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 12th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson
Clerk of the Appellate Court.

6865 15742

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Eugene J. Lamarre, Administrator De Bonis Non of the Estate of Louis Walter, deceased, Appellee. vs. Cleveland, Cincinnati, Chicago & St. Louis Railway Company, a Corporation, and Illinois Central Railroad Company, a corporation. Appellants.	Appeal from Kankakee

Heard, J.

This case was before us at the October 1919, term and was reversed for error in instructing the jury. Lamarre vs. C.C. C. & St. L. Ry. Co., et al, _____ Ill. App._____, opinion filed March 9, 1920. A second trial resulted in a judgment for appellee against appellants for $3,500.00, from which judgment an appeal has been perfected to this court.

At Kankakee the I C R R runs north and south and the K & S R.R. which is a part of the C C C & St. L Ry., commonly called the Big Four, runs east and west. A Y turns off from the I.C. tracks some distance north of the crossing of the roads and runs to the southeast on a curve until it joins the K & A east of the crossing. The K & S tracks are laid in Cypress street, one of the public streets of the City of Kankakee. After coming around the "Y", Big Four trains from the north run east on Cypress street a few blocks to the passenger station of the Big Four. The railroad tracks on Cypress street are frequently used for the public travel.

On February 27, 1916, Louis Walters, a boy 15 years of age while walking east upon the main track of the K & S on Cypress street, at its intersection with Dearborn street, was struck and killed by a passenger train which had just come from the Y and was going east to the Big 4 station. This suit was brought by the administrator of the estate of Louis Walters,

Eugene J. Lamarre, Administrator De Bonis Non of the Estate of Louis Walter, deceased, Appellee. vs. Cleveland, Cincinnati, Chicago & St. Louis Railway Company, a Corporation, and Illinois Central Railroad Company, a Corporation, Appellants.	Appeal from Kankakee

Heard, J.

This case was before us at the October 1918, term and was reversed for error in instructing the jury. Lamarre vs. C.C. C. & St. L. Ry. Co., et al, _____ Ill. App._____, opinion filed March 9, 1920. A second trial resulted in a judgment for appellee against appellants for $8,500.00, from which judgment an appeal has been perfected to this court.

At Kankakee the I C R R runs north and south and the K & S R.R. which is a part of the C C C & St. L Ry., commonly called the Big Four, runs east and west. A Y turns off from the I.C. tracks some distance north of the crossing of the roads and runs to the southeast on a curve until it joins the K & A east of the crossing. The K & S tracks are laid in Cypress street, one of the public streets of the City of Kankakee. After coming around the "Y", Big Four trains from the north run east on Cypress street a few blocks to the passenger station of the Big Four. The railroad tracks on Cypress street are frequently used for the public travel.

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deceased, appellee against appellants, the Big 4 and I C R R Co.

The declaration in the case contains twelve counts, the first alleging general negligence in operating the train. The fifth is the same except that the negligence is charge to have been wilful and wanton. The second count is upon the statutory requirement as to sounding a bell or whistle and alleges failure to ring a bell or blow a whistle. The sixth is the same except that the failure to ring bell or blow whistle is charged to have been wilful and wanton. The third count c charges that there was an ordinance of the City of Kankakee requiring the bell of each locomotive to be rung continuously while running within the city and a failure to comply therewith. The seventh count was the same except that the failure to ring bell was alleged to have been wanton and wilful. The fourth count charges a violation of a city ordinance limiting the speed of passenger trains to ten miles per hour. The eighth count charges such violation to have been wanton and wilful. The ninth count charges that defendants wantonly and wilfully ran the train over deceased.

Appellee offered no evidence as to a failure to ring a bell or blow a whistle and those counts are eliminated from our consideration.

There were eye witnesses to the accident. Appellee offered no evidence which tended to show that deceased was in the exercise of ordinary care for his own safety at the time of and just prior to the accident. The only two of appellee's witnesses who saw the accident or who saw deceased within half a block of the accident are Fred Jewett, who testified he did not see deceased until just before he was struck and that he was walking east at a natural gait on Cypress street within the limits of Dearborn avenue, and W. S. Ball, who testified he

Issued, appellee against appellants, the Mg & and T C & N Co.

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There were eye witnesses to the accident. Appellee offer- ed no evidence which tended to show that deceased was in the exercise of ordinary care for his own safety at the time of and just prior to the accident. The only two of appellee's witnesses who saw the accident or who saw deceased within half a block of the accident are Fred Jewett, who testified he did not see deceased until just before he was struck and that he was walking east at a natural gait on Cypress street within the limits of Dearborn avenue, and W. E. Ball, who testified he

saw the boy who was killed just before the train struck him a very few seconds and that apparently to witness he was east of Dearborn avenue and right in the center of the track between the two rails of the main track; that he was walking east; that he saw him throw his head around at the train and apparently went to step out and hardly had time to raise one foot off the ground when he was struck by the engine. The evidence shows that deceased was familiar with the locus in quo; that there was a foot path on each side of the track at a safe distance therefrom; that the train was on time; that its bell was ringing and that the train was making so much noise that it attracted appellee's witness Boudreau to the window of his residence; that deceased had his coat collar turned up and his cap pulled down over his ears. In this state of the record no recovery could be had under the counts of the declaration charging ordinary negligence.

At the close of appellee's evidence and at the close of all the evidence appellant moved the court to instruct the jury to find the defendants not guilty, which motion the court denied. Upon the former appeal we held that this was not error and we adhere to that conclusion. Upon a motion to direct a verdict the party against whom the motion is directed is entitled to the benefit of all the evidence in his favor in its most favorable aspect to him, and to the benefit of all presumptions that may be reasonably drawn from such evidence. The evidence is not weighed, but all contradictory evidence or explanatory circumstances must be rejected. Yen v. Yen, 255 Ill. 414; McCune v. Reynolds, 288 Ill. 188.

It is claimed by appellant that the record does not sustain the judgment. At the time of the accident there was in force in the city of Kankakee an ordinance prohibiting the running of passenger trains within the city limits at a greater rate of speed than ten miles per hour. It is claimed by appellee

but the boy who was killed just before the train struck him a very few seconds and that apparently to witness he was out of Burnside avenue and right in the center of the track between the two rails of the main track; that he was walking east; that he saw his sister his best friend in the train and apparently went to step out and hastily and in trying to raise one foot off the ground when he was struck by the engine. The evidence above this moment was fulfilling with the issue in that there was a foot path on each side of the track at a wide distance therefrom; that the train was in view; that its bell was ringing and that the train was making so much noise that it attracted appellee's witness standing on the middle of his residence; that deceased had his coat collar turned up and his cap pulled down over his ears. In this state of the record no recovery could be had under the counts of the declaration charging ordinary negligence.

In the close of appellee's evidence and at the close of all the evidence appellant moved the court to instruct the jury to find the defendants not guilty, which motion the court denied. Upon the former appeal we held that this was not error and we adhere to that conclusion. Upon a motion to direct a verdict the party against whom the motion is directed is entitled to the benefit of all the evidence in his favor in its most favorable aspect to him, and to the benefit of all reasonable inferences that may be reasonably drawn from such evidence. The evidence is not weighed, but all contradictory evidence or exculpatory circumstances must be rejected. Ins. Co. v. Tel, 222 Ill. 414; Adams v. Tanner, 244 Ill. 132.

It is claimed by appellant that the record does not sustain the judgment. At the time of the accident there was in force in the city of Kankakee an ordinance prohibiting the running of passenger trains within the city limits at a

that appellant was violating this ordinance at the time of the accident and was thereby guilty of wanton and wilful negligence under the circumstances of this case.

The only witness called by appellee who testified as to the speed of the train was David Beaudreau, who said that in his judgment the train was going twenty miles per hour. He had previously signed a statement that the train was not going very fast. A flagman at the street crossing next west of Dearborn avenue said it looked to him that the train was going eight to ten miles per hour. The brakeman on the train placed the speed at 10 to 15 miles per hour. The fireman on the engine which killed deceased, who was not in appellant's employ at the time of the trial, fixed the speed at 10 to 12 miles per hour. A flagman at the crossing east of Dearborn avenue who was not in appellant's employ at the time of the trial gave it as his judgment that the train was going 8 to 10 miles per hour. The engineer died prior to the trial.

The violation of a speed ordinance of itself, alone, does not constitute wilful or wanton negligence but such violation taken together with other circumstances will sometimes constitute such negligence.

In Hethington vs. I C R R Co., 83 Ill. 510, it was said; "While it is true the railroad company was running its train at a greater rate of speed than allowed by the ordinance of the city of Chicago, yet, that fact did not relieve the deceased from the exercise of ordinary care, nor can the speed of the train alone be regarded as furnishing a sufficient reason for holding that the injury was wilful or wanton". In Blanchard v. L SL& M S Ry. Co. 126 Ill. 416, it was said; "The plaintiff in the case has not shown that the conduct of the defendant or its servants was wanton or wilful. The proof tends to show that the engine was moving at a rate of speed greater than

that appellant was violating this ordinance at the time of the accident and was thereby guilty of wanton and willful negligence under the circumstances of this case.

The only witness called by appellee who testified as to the speed of the train was David Bennigsen, who said that in his judgment the train was going twenty miles per hour. He had previously signed a statement that the train was not going very fast. A flagman at the street crossing next west of Dearborn avenue said it looked to him that the train was going eight to ten miles per hour. The brakeman on the train placed the speed at 10 to 15 miles per hour. The fireman on the engine which killed deceased, who was not in appellant's employ at the time of the trial, fixed the speed at 10 to 12 miles per hour. A flagman at the crossing east of Dearborn avenue who was not in appellant's employ at the time of the trial gave it as his judgment that the train was going 8 to 10 miles per hour. The engineer died prior to the trial.

The violation of a speed ordinance of itself, alone, does not constitute willful or wanton negligence but such violation taken regardless of other circumstances will sometimes constitute such negligence.

In Hethington vs. I C R R Co., 85 Ill. 610, it was said; "While it is true the railroad company was running its train at a greater rate of speed than allowed by the ordinance of the city of Chicago, yet, that fact did not relieve the deceased from the exercise of ordinary care, nor can the speed of the train alone be regarded as furnishing a sufficient reason for holding that the injury was willful or wanton". In Blanchard v. L Sta M S Ry. Co. 120 Ill. 412, it was said; "The plaintiff in the case has not shown that the conduct of the defendant or its servants was wanton or willful. The proof tends to show that the engine was moving at a rate of speed greater than

that permitted by the city ordinance. This circumstance might well have been considered by the jury in determining whether the defendant was guilty of such negligence as caused the death of deceased if the latter had been lawfully upon the track or had otherwise been in the exercise of ordinary care"

The engineer was on the right side of the engine cab and as it rounded the curve and approached deceased, was not in a position to see him. The fireman who was on the left side of the cab testified that he first saw deceased 145 feet from the place of the accident and that he did not lose sight of him until just before it occurred and it is claimed that as he gave no warning this taken in connecting with the violation of the ordinance constituted wilful or wanton negligence. The fireman also testified, however, that deceased walked alongside of the track in the clear, in a place of safety until the engine got within ten or fifteen feet of him when he walked over in the middle of the track.

The train was a regular passenger train consisting of an engine and five or six cars and was running on its regular schedule time. When about 1000 feet from the crossing in question the whistle was blown and again when coming in on the Y four blasts, two long and two short were sounded. An automatic bell was ringing. The engine was making steam and the sound of the exhaust was heard by some of the witnesses. As it approached deceased it made so much noise that the attention of appellee's witness Beaudreau, who was in his house across the street, was attracted to it before he saw it. There were flagmen at the crossing, both east and west of Dearborn avenue. The street was not crowded. The evidence shows that the track was sometimes used by pedestrians. There were paths on each side of it and the evidence does not show that any person other than deceased was near the track within two blocks at

that permitted by the city ordinance. This circumstance might well have been considered by the jury in determining whether the defendant was guilty of such negligence as caused the death of deceased if the latter had been lawfully upon the track or had otherwise been in the exercise of ordinary care"

The engineer was on the right side of the engine cab and as it rounded the curve and approached deceased, was not in a position to see him. The fireman who was on the left side of the cab testified that he first saw deceased 140 feet from the place of the accident and that he did not lose sight of him until just before it occurred and it is claimed that as he gave no warning this taken in connecting with the violation of the ordinance constituted wilful or wanton negligence. The fireman also testified, however, that deceased walked along-side of the track in the clear, in a place of safety until the engine got within ten or fifteen feet of him when he walked over in the middle of the track.

The train was a regular passenger train consisting of an engine and five or six cars and was running on its regular schedule time. When about 1000 feet from the crossing in question the whistle was blown and again when coming in on the Y four blasts, two long and two short were sounded. In auto-matic bell was ringing. The engine was moving about six and the sound of the exhaust was heard by some of the witnesses. As it approached deceased it made so much noise that the attention of appellee's witness Beauchesne, who was in his house across the street, was attracted to it before he saw it. There were flagmen at the crossing, both east and west of Dearborn avenue. The street was not crowded. The evidence shows that the track was sometimes used by pedestrians. There were paths on each side of it and the evidence does not show that any person other than deceased was near the track within ten minutes or

the time in question. Appellants had a legal right to use the street for the running of their trains at the time and place in question.

Wilful negligence consists of something more than a mere omission of duty. A charge of wilful negligence implies an act intentionally done in disregard of anothers rights, or the omission, after such notice of another's danger as would put a prudent man upon his guard of the use of ordinary care for the purpose of avoiding injury to such others. Waldren Express Co. vs. Krug, 291 Ill. 479; C W D Ry. Co. vs. Ryan, 131 Ill. 474; 30 Cyc 510.

When the evidence in the case is considered altogether and not solely that favorable to appellee with the inferences and presumptions arising therefrom, we are of the opinion that appellants were not guilty of wilful or wanton negligence and that the verdict was manifestly against the weight of the evidence and the judgment is therefore reversed.

Finding of Facts.

We find that at the time of the accident deceased was not in the exercise of ordinary care for his own safety and we find that appellants were not guilty of wilful and wanton negligence.

the time in question. Appellants had a legal right to use the street for the running of their trains at the time and place in question.

Wilful negligence consists of something more than a mere omission of duty. A charge of wilful negligence implies an act intentionally done in disregard of another's rights, or the omission, after such notice of another's danger as would put a prudent man upon his guard of the use of ordinary care for the purpose of avoiding injury to such others. Walker Express Co. vs. Krug, 291 Ill. 473; C W D Ry. Co. vs. Ryan, 131 Ill. 474; 20 Cyc 310.

When the evidence in the case is considered altogether and not solely that favorable to appellee with the inferences and presumptions arising therefrom, we are of the opinion that appellants were not guilty of wilful or wanton negligence and that the verdict was manifestly against the weight of the evidence and the judgment is therefore reversed.

Finding of Facts.

We find that at the time of the accident deceased was not in the exercise of ordinary care for his own safety and we find that appellants were not guilty of wilful and wanton negligence.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 12th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson
Clerk of the Appellate Court.

6867 (1395a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Joseph Royster, Appellee, vs. J. C. Murdock, Appellant.	)	Appeal from Peoria.

Heard, J.

This is an action brought by appellee against appellant, a dental surgeon, of Peoria, Ill., for mal-practice in the treatment and extraction of a lower left wisdom tooth of appellee.

The declaration in the case consisted of five counts. The first count charges negligent treatment in general terms. The second count charges that on account of lack of care as a dentist, appellant in extracting appellee's wisdom tooth fractured his jaw. The third count alleges negligence in preparing appellee's tooth and mouth for treatment. The fourth count alleges that appellant negligently used unsanitary and unclean dental tools in the treatment and extraction of appellee's tooth and the fifth count charges appellant with a want of due care and skill in treating appellee's jaw and in not removing or eliminating decayed bone and other offensive matter therefrom. Appellant filed a plea of the general issue and a jury trial resulted in a verdict and judgment in appellee's favor for $2,000 damages, from which judgment appellant has appealed.

The main question in this case is whether or not the verdict of the jury was warranted by the evidence in the case.

Appellee is a man 33 years of age and in September 1915 was troubled with the third molar (commonly called a wisdom tooth) of his left lower jaw which failing to entirely penetrate the gum caused local irritation and inflammation. The irrita-

Joseph Royster, Appellee, vs. J. C. Burnett, Appellant.	Appeal from Peoria.

Dent, J.

This is an action brought by appellee against appellant, a lawful surgeon, of Peoria, Ill., for mal-practice in the treatment and extraction of a lower left wisdom tooth of appellee.

The declaration in the case consisted of five counts. The first count charges negligent treatment in general terms. The second count charges that on account of lack of care as a dentist, appellant in extracting appellee's wisdom tooth fractured his jaw. The third count alleges negligence in prescribing appellee's bath and mouth for treatment. The fourth count alleges that appellant negligently and unnecessary and unskilled dentist tools in the treatment and extraction of appellee's tooth and the fifth count charges appellant with a want of due care and skill in treating appellee's jaw and in not removing or eliminating decayed bone and other affecting matter therefrom. Appellant filed a plea of the general issue and a jury trial resulted in a verdict and judgment in appellee's favor for $3,000 damages, from which judgment appellant has appealed.

The main question in this case is whether or not the verdict of the jury was warranted by the evidence in the case.

Appellee is a man 32 years of age and in December 1912 was troubled with the third molar (commonly called a wisdom tooth) of his left lower jaw which failure to erupt caused his gum swelled, caused irritation and inflammation. The irritation

tion increasing on September 9, 1915, appellee went to appellant's office for the purpose of having the tooth extracted. Appellant made an examination of the tooth and jaw, made an appointment with appellee for eleven o'clock of that day at which time appellant extracted the tooth with the assistance of Dr. Hinkle, who administered an anaesthetic to appellee.

Appellee testified that immediately on regaining consciousness he felt great pain in his jaw, which grew so much worse that in the evening appellant was called to appellee's home. Appellant made an examination, and cleaned the place and gave him some local treatment. On Saturday he called Dr. Roberts, a physician, who gave him some medicine for the pain. On Sunday Dr. Roberts again visited and treated him and on Monday appellee went to a hospital where an incision was made on the outside of the jaw to furnish drainage to carry off the accumulations of pus which had gathered there. A second operation, similar in character, was performed about six weeks later. In December a sliver of bone worked its way through the skin on the outside of the jaw. In January 1916, Dr. Hanna, a surgeon, removed some necrosed portions of the jaw bone.

It is claimed by appellee that this condition was the result of appellant's negligent treatment but there is no expert evidence in the record to that effect. On the other hand appellant and Dr. Hinkle testified that at the time of the extraction of the tooth the gums were inflamed and infected and in this they are corroborated by Dr. Graber another dentist, who examined the tooth a few days before but was too busy to extract it at that time.

Appellee and Dr. Hinkle gave in detail the method adopted in the extraction of the tooth and the cleansing treatment then given the jaw and both testify that the jaw was not fractured.

tion increasing on September 3, 1919, appellee went to appellant's office for the purpose of having the tooth extracted. Appellant made an examination of the tooth and jaw, made an appointment with appellee for eleven o'clock of that day at which time appellant extracted the tooth with the assistance of Dr. Hinkle, who administered an anaesthetic to appellee.

Appellee testified that immediately on regaining consciousness he felt great pain in his jaw, which grew so much worse that in the evening appellant was called to appellee's home. Appellant made an examination, and cleaned the place and gave him some local treatment. On Saturday he called Dr. Roberts, a physician, who gave him some medicine for the pain. On Sunday Dr. Roberts again visited and treated him and on Monday appellee went to a hospital where an incision was made on the outside of the jaw to furnish drainage to carry off the accumulations of pus which had gathered there. A second operation, similar in character, was performed about six weeks later. In December a sliver of bone worked its way through the skin on the outside of the jaw. In January 1919, Dr. Hanna, a surgeon, removed some necrosed portions of the jaw bone.

It is claimed by appellee that this condition was the result of appellant's negligent treatment but there is no expert evidence in the record to that effect. On the other hand appellant and Dr. Hinkle testified that at the time of the extraction of the tooth the gums were inflamed and infected and in this they are corroborated by Dr. Graber another dentist, who examined the tooth a few days before but was too busy to extract it at that time.

Appellee and Dr. Hinkle gave in detail the method adopted in the extraction of the tooth and the cleansing treatment than gives the jaw and both testify that the jaw was fractured

There is no evidence in the case that the instruments were unclean and not properly sterilized. Drs. Hinkle, Graber, Roberts and Hanna all testify that the treatment by appellant was proper treatment and that in their opinion, based on the facts in the case, the tooth and jaw of appellee had become infected prior to the extraction of the tooth and that the results following it were due to such infection.

Liability cannot rest upon imagination, speculation or conjecture, nor upon a choice between two views equally compatible with the evidence, but must be based upon facts established by evidence fairly tending to prove them. Peterson vs. Indus. Comm. 281 Ill. 326; W.S. Co. vs. Indus. Comm. 288 Ill. 206; U. D. Co. vs. Indus. Comm. 295 Ill. 111.

It is claimed by appellee that had appellant taken an X ray picture he could have ascertained the condition of appellee's jaw at the time of the extraction of the tooth. The evidence shows that at that time the X ray machine was not in common use in dentistry although it was some times used. Appellee's contention is that if appellant could have learned the nature of the malady, and applied the proper remedy and did not do so he is liable. This is not the law in this state. In Quinn vs. Donovan, 85 Ill. 194, it was said: "The second instruction given for appellee, in substance announced the principle that, if appellant could have learned the nature of the injury, and applied the proper remedy and failed, he is liable. We do not understand the law imposes as high a degree of skill as the instruction would seem to indicate. A fair and reasonable construction of the instruction would not only require of appellant reasonable, but extra-ordinary care in his practice."

The profession of dentistry is on a parity with that of medicine. The rule is well settled in this state that a physician or dentist can not be regarded as an insurer of a

There is no evidence in the case that the instruments were unclean and not properly sterilized. Drs. Hankle, Graber, Roberts and Hanna all testify that the treatment by appellant was proper treatment and that in their opinion, based on the facts in the case, the tooth and jaw of appellee had become infected prior to the extraction of the tooth and that the results following it were due to such infection.

Liability cannot rest upon imagination, speculation or conjecture, nor upon a choice between two views equally certain with the evidence, but must be based upon facts established by evidence fairly tending to prove them. Peterson vs. Indus. Comm. 281 Ill. 384; T.S. Co. vs. Indus. Comm. 329 Ill. 207; T. S. Co. vs. Indus. Comm. 329 Ill. 111.

It is claimed by appellee that had appellant taken an X ray picture he could have ascertained the condition of appellee's jaw at the time of the extraction of the tooth. The evidence shows that at that time the X ray machine was not in common use in dentistry although it was some times used. Appellee's contention is that if appellant could have learned the nature of the malady, and applied the proper remedy and did not do so he is liable. This is not the law in this state. In Quinn vs. Donovan, 85 Ill. 194, it was said: "The second instruction given for appellee, in substance announced the principle that, if appellant could have learned the nature of the injury, and applied the proper remedy and failed, he is liable. We do not understand the law imposes as high a degree of skill as the instruction would seem to indicate. A fair and reasonable construction of the instruction would not only require of appellant reasonable, but extra-ordinary care in his practice."

The profession of dentistry is on a parity with that of medicine. The rule is well settled in this state that a physician or dentist can not be regarded as an insurer of a

successful result as the most learned and skilled will sometimes fail of success.

The rule is that a person who is engaged in the practice of the profession of physician, surgeon or dentist is required to possess, and in practice use not extraordinary skill or the highest degree of skill, but reasonable skill, such as physicians, surgeons or dentists in good practice ordinarily use. The rule on this subject is laid down in Richey vs. West 23 Ill. 329, a case of some historic interest owing to the fact that Abraham Lincoln appeared in the Supreme court in behalf of the plaintiff in error. This case was followed in McNevins vs. Lowe, 40 Ill. 209; Hallam vs. Means, 88 Ill. 379 and Quinn vs. Donovan, supra.

Tested by these rules we are of the opinion that the verdict of the jury was so manifestly against the weight of the evidence as to require a reversal of the case. The judgment is reversed and the cause remanded.

Niehaus, J., took no part.

successful result as the most learned and skilled will sometimes fail of success.

The rule is that a person who is engaged in the practice of the profession of physician, surgeon or dentist is required to possess, and in practice use not extraordinary skill or the highest degree of skill, but reasonable skill, such as physicians, surgeons or dentists in good practice ordinarily use. The rule on this subject is laid down in Hickey vs. West 83 Ill. 29, a case of some historic interest owing to the fact that Abraham Lincoln appeared in the Supreme court in behalf of the plaintiff in error. Mr. Lincoln was interested in Hickey vs. West, 40 Ill. 209; Hallam vs. Moore, 88 Ill. 376 and Quinn vs. Donovan, supra.

Tested by these rules we are of the opinion that the verdict of the jury was so manifestly against the weight of the evidence as to require a reversal of the case. The judgment is reversed and the cause remanded.

Mr. Justice, J., took no part.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 13th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson
Clerk of the Appellate Court.

6868 (5700)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Charles L. Schultz, Appellee, vs. Chicago and Alton Railroad Company, Appellant.	Appeal from Will

Heard, J.

This case was before us at the October, 1918, term and in reversing the case in Schultz vs. C & A R.R. Co. 213 Ill. App. 628, we then said; "Charles L. Schultz, the appellee, 50 years old, in the employ of Timroth Teaming Company, a truck driver, in September, 1916, drove a heavy truck onto the tracks of the appellant railroad company at a street crossing in the City of Joliet, where he came in collision with an engine and was severely injured. He brought this action on the case, charging in his declaration of three counts: (1) improper running and operation of the engine; (2) carelessly running the engine across the highway with crossing gates open; and (3) carelessly leaving the crossing gates open, leading him to believe that he would be in no danger in going upon the tracks.

He introduced evidence supporting the charges of appellant's negligence and the allegations of his own care. Appellant's evidence is in direct conflict therewith, and supports its theory that the occurrence was the result of appellee's carelessness in driving upon the track while its servants were in the exercise of ordinary care in handling the engine. A reading of the record leaves much room for question whether appellee's allegations of appellant's negligence and his own care are either of them sustained by a preponderance of the evidence. Giving weight to the fact that the jury and trial judge were better able than ourselves to judge of the credibility

Charles L. Gamble, Appellee, vs. Dodge and Alton Railroad Company, Appellant.	Appeal from Will

Hand, J.

This case was before us at the October, 1906, term and is reversing the case in Volume 1. C. A. R. 26, 111 Ill. App. 286, we then said: "Charles L. Gamble, the appellee, 20 years old, in the employ of Theodore Thomson, a trade driver, in September, 1903, drove a heavy truck with the tracks of the appellant railroad crossing as a driver crossing in the City of Joliet, where he came in collision with an engine and was severely injured. He brought this action on the case, charging in the declaration of three counts: (1) improper running and operation of the engine; (2) negligently running the engine across the highway with crossing gates open; and (3) negligently leaving the crossing gates open, leading him to believe that he might go in safety in going upon the tracks.

He introduced evidence supporting the charges of appellee's negligence and the allegations of his own care. Appellant's evidence is in direct conflict therewith, and supports its theory that the occurrence was the result of appellee's carelessness in driving upon the track while its servants were in the exercise of ordinary care in handling the engine. A reading of the record leaves much room for question whether appellee's allegations of appellant's negligence and his own care are either of them sustained by a preponderance of the evidence. Giving weight to the fact that the jury and trial judge were better able than ourselves to judge of the credibility

of witnesses that testified before them, we only say that the evidence on those points was so conflicting and doubtful that a verdict for appellee should only be permitted to stand on a record otherwise free from material error.

Appellee's injury required a serious surgical operation in the removal of a portion of his small intestines. He testified that he had ever since been unable to work. He was able to go home from the hospital in less than a month. The physicians who performed the operation testify that he made a good recovery, and there is apparently credible medical testimony that there is nothing in his present condition which should prevent him from performing manual labor. His counsel only claim here that he is probably permanently disabled. He had a verdict and judgment for $13,000. We are inclined to the opinion that because of the unusual character of the operation and the impression made on laymen by its description, the verdict was much larger than it would have been for an equally damaging injury of some kind more familiar to the members of a jury, and more readily understood by them."

A new trial resulted in a judgment for $13,000 in favor of appellee and as the evidence on the second trial was practically the same as on the first what we then said applies with equal force to the present appeal.

At the request of appellee the court gave to the jury the following instruction: "The court instructs the jury, that the credibility of the witnesses is a question exclusively for the jury; and the law is, that where a number of witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury has a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of

of witnesses that testified before them, we only say that the evidence on those points was so conflicting and doubtful that a verdict for appellee should only be permitted to stand on a record otherwise free from material error.

Appellee's injury required a serious surgical operation in the removal of a portion of his small intestines. He testified that he had ever since been unable to work. He was able to go home from the hospital in less than a month. The physicians who performed the operation testify that he made a good recovery, and there is apparently credible medical testimony that there is nothing in his present condition which should prevent him from performing manual labor. His counsel only claim here that he is probably permanently disabled. He had a verdict and judgment for $13,000. We are inclined to the opinion that because of the unusual character of the operation and the impression made on layman by its description, the verdict was much larger than it would have been for an equally damaging injury of some kind more familiar to the members of a jury, and more readily understood by them."

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intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit, and to give credit accordingly." This instruction was condemned in People vs. Fox, 269 Ill. 300; I.C.M.A. vs. Perrin 139 Ill. App. 543; Ames vs. Threu, 136 Ill. App. 562; Ryan vs. People, 122 Ill. App. 461 and People vs. Terrell, 262 Ill. 138, in which latter case it was said that if the guilt of the defendant was doubtful or the case not clear the giving of this instruction might require a reversal of the judgment.

By appellee's 3rd instruction certain elements were enumerated which the jury were told they "should" take into consideration in arriving at their verdict. Instructions of this character have been condemned in C.U.T.Co. vs. Hampe, 228 Ill. 346; Lyons vs. C.C.Ry. Co. 258 Ill. 75; People vs. Schultz 260 Ill. 35; People vs. Munday 204 Ill. App. 24, and Rynearson vs. McCartey 203 Ill. App. 555.

Appellee's 5th given instruction which is on the measure of damages does not limit the damages to be recovered to those alleged in the declaration. This was error, Show vs. A.J. & St. L.T. Co. 152 Ill. App. 552; Metcalf vs. C.S.C.Co. 211 Ill. App. 31. This instruction also tells the jury that in determining the amount of damages they should take into consideration all the facts and circumstances as proven by the evidence before them without limiting it to the facts and circumstances in evidence upon the question of damages. The giving of an instruction containing similar language was held to be reversible error in a close case in Levitan vs. C. A. Ry. Co. 203 Ill. App. 411. This instruction is also defective in not commencing the second sentence thereof with the words, "If you so find" or words of similar import. It should also contain the words, "if you find for the plaintiff you" in the latter part of the

intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit, and to give credit accordingly." This instruction was condemned in People ve. Fox, 288 Ill. 300; I.C.M.A. va. Ferris 132 Ill. App. 542; Amos va. Trees, 148 Ill. App. 167; Ryan va. People, 146 Ill. App. 481 and People ve. Terrell, 242 Ill. 124, in which latter case it was said that if the guilt of the defendant was doubtful or the case not clear the giving of this instruction might require a reversal of the judgment.

By appellee's 3rd instruction various elements were enumerated which the jury were told they "should" take into consideration in arriving at their verdict. Instructions of this character have been condemned in C.U.T.Co. va. Kempe, 220 Ill. 546; Lyons va. C.C.Ry. Co. 258 Ill. 75; People va. Sonnitz 260 Ill. 35; People va. Munday 204 Ill. App. 24, and Thompson va. McCartney 203 Ill. App. 588.

Appellee's 5th given instruction which is on the measure of damages does not limit the damages to be recovered to those alleged in the declaration. This was error. Ryan va. A.,T. & St. L.T. Co. 152 Ill. App. 582; Metcalf va. C.S.C.Co. 211 Ill. App. 31. This instruction also tells the jury that in determining the amount of damages they should take into consideration all the facts and circumstances as proven by the evidence before them without limiting it to the facts and circumstances in evidence upon the question of damages. The giving of an instruction containing similar language was held to be reversible error in a close case in Levitan va. C. A. Ry. Co. 203 Ill. App. 112. This instruction is also defective in not connecting the second sentence forward with the words, "If you so find" or words of similar import. It should also contain the words, "If you find for the plaintiff you" in the latter part of the

instruction between the word "and" and the words "may find".

When instructions have been repeatedly condemned and counsel persist in offering them it is the duty of the court, in cases like the present where the right of recovery is not clear and the damages are excessive, to manifest its disapproval of the practice by reversing the case.

The cause will be reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 13th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson
Clerk of the Appellate Court.

6869 (297a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Charles Braseman, Administrator of the Estate of Frank Braseman, deceased, Appellee vs. Fred Klahn, Appellant.	Appeal from Kane

Heard, J.

This is an action to recover damages accasioned by the death of Frank Braseman, who died as a result of injuries caused by being caught by and run over by a large wheel of a tractor owned by appellant.

The declaration in the case consists of two counts. The first count alleges general negligence in the operation, driving and management of the tractor and injuries to deceased resulting therefrom while he was in the exercise of ordinary care for his own safety.

The second count alleges wilful and wanton negligence. The trial resulted in a judgment of $2400 in favor of appellee against appellant, from which judgment this appeal is taken.

Appellant contends that the evidence does not show that deceased was in the exercise of due care for his safety and that it does not show negligence on the part of appellant.

Appellant was the owner of a farm in Kane county and used thereon a tractor in plowing, filling silo and other farm work. Deceased was a farm hand working for appellant on October 7, 1918, the day of the accident. Prior to this day appellant was engaged in filling his silo, and was assisted by the deceased Frank Braseman and the witnesses, Carl Hepfinger and William E. Wagner. On the morning of the accident these four proceeded to the work of filling the silo. This work was done on the west side of the barn.

Charles Brasseman,
Administrator of the
Estate of Frank Brase-
man, deceased,

Appellee

vs.

Fred Mishm,

Appellant.

Appeal from Lane

Hand, J.

This is an action to recover damages occasioned by the death of Frank Brasseman, who died as a result of injuries caused by being caught by and run over by a large wheel of a tractor owned by appellant.

The declaration in the case consists of two counts. The first count alleges general negligence in the operation, driving and management of the tractor and injuries to deceased resulting therefrom while he was in the exercise of ordinary care for his own safety.

The second count alleges wilful and wanton negligence. The trial resulted in a judgment of $2400 in favor of appellee against appellant, from which judgment this appeal is taken.

Appellant contends that the evidence does not show that deceased was in the exercise of due care for his safety and that it does not show negligence on the part of appellant.

Appellant was the owner of a farm in Kane county and used thereon a tractor in plowing, filling silo and other farm work. Deceased was a farm hand working for appellant on October 7, 1919, the day of the accident. Prior to this day appellant was engaged in filling his silo, and was assisted by the deceased Frank Brasseman and the witnesses, Carl Hoplinger and William E. Wagner. On the morning of the accident these four proceeded to the work of filling the

At the south end of the barn stood the tractor, and about sixty feet north of that, the silo was located, and immediately south of the silo, a little to the west, stood the silo filler. The silo filler had a belt wheel and the tractor also had a belt wheel and between the two a belt was stretched which was about 100 feet long, single, and about 50 feet long, double. The belt was kept in the barn over night and on the morning in question brought out and placed on the belt wheel of the silo filler and the belt wheel of the tractor. The tractor was used to transmit power by means of the belt to the silo filler and drive that machine in the operation of filling the silo. On the morning of the accident, the machine had been running a very short time, when it stopped. The witness, Hepfinger, said the belt flew off and the thing stopped. The witness, Wagner, said that when the machine stopped the belt was still on and Klahn started to take it off, but not being able to take it off himself, Braseman, Hepfinger and Wagner, put a hand in it and pulled off the belt and it was laid on the edge of the side walk. The defendant Klahn, then proceeded to attempt to put the tractor in line, preparatory to again putting the belt on, and starting the machinery, so that the belt when fastened to the filler, should be in line with the belt wheel on the tractor.

Just prior to the time of the injury the belt of the tractor end was on the cement floor. There is evidence that appellant directed deceased to pick up the belt, which he did. Braseman had the tractor end of the belt over his left arm and both he and Hepfinger were standing on the cement sidewalk. The tractor engine had been started up again and appellant had gone to the rear of the tractor engine and gotten upon the platform preparatory to operating the same. Both witness Hepfinger and the deceased were near and just

at the south end of the barn stood the tractor, and about sixty feet north of that, the silo was located, and immediately north of the silo, a little to the west, stood the silo filler. The silo filler had a belt wheel and the tractor also had a belt wheel and between the two a belt was stretched which was about 100 feet long, single, and about 30 feet long, double. The belt was kept in the barn over night and on the morning in question Wenger had placed on the belt wheel of the silo filler and the belt wheel of the tractor. The tractor was used to transmit power by means of the belt to the silo filler and drive that machine in the operation of filling the silo. On the morning of the accident, the machine had been running a very short time, when it stopped. The witness, Hepfinger, said the belt flew off and the thing stopped. The witness, Wenger, said that when the machine stopped the belt was still on and Hiemm started to take it off, but not being able to take it off himself, Brasseman, Hepfinger and Wenger put a hand in it and pulled off the belt and it was laid on the edge of the silo wall. The defendant Hiemm, then proceeded to attempt to put the tractor in line, preparatory to again putting the belt on, and starting the machinery, so that the belt when fastened to the filler, should be in line with the belt wheel on the tractor.

Just prior to the time of the injury the belt of the tractor and was on the cement floor. There is evidence that appellant directed deceased to pick up the belt, which he did. Brasseman had the tractor end of the belt over his left arm and both he and Hepfinger were standing on the cement sidewalk. The tractor engine had been started up again and appellant had gone to the rear of the tractor machine and gotten upon the platform preparatory to operating the same. Both witness Hepfinger and the deceased were near and just

east of the tractor engine, about opposite the belt pulley on the tractor and both were looking in a northerly direction; they were not watching the big wheel, which was to their left and behind them and 54 inches in diameter; they were watching the other end where the little wheels were. Both were close to the tractor engine - maybe a foot and a half or two feet from it. Hepfinger was right beside deceased, within a few inches of him.

The tractor engine was a 10-20 horse power, one cylinder machine operated by kerosene; it weighed about 5500 pounds. For use in traveling it had two speed levers and one clutch lever, which were at the rear end of the tractor and to the left of the center of the rear platform. The levers were readily accessible. To move the tractor forward a speed lever is thrown forward so as to engage the speed gears. Next the clutch lever is thrown forward so as to engage the clutch. As the clutch begins to take hold by the operation of the clutch lever, the tractor engine begins to move forward. The tractor has two speeds forward, the maximum of which is two and two and a half miles respectively. For use in plowing some big lugs are bolted to the surface of the rear wheels, which are the driving wheels. They stick up perpendicularly about 2½ inches from the surface of the wheel and the lugs also run out beyond the edge of the wheel and stick out about eight inches. There is a throttle at the right of the center of the platform at the rear end of the tractor, which is the gas control. It is readily accessible from the platform, and half a turn, or hardly that, is all that is necessary in turning off the gas. When the engine is started up the fly-wheel on the right side of the tractor is revolving. ~~To stop the fly-wheel on the right side of the tractor is revolving~~. To stop the fly-wheel from revolving this throttle or gas control is turned.

east of the tractor engine, about opposite the belt pulley on the tractor and both were looking in a northerly direction; they were not watching the big wheel, which was to their left and behind them and 84 inches in diameter; they were watching the other and where the little wheels were. Both were close to the tractor engine - maybe a foot and a half or two feet from it. Hepfinger was right beside deceased, within a few inches of him.

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There is evidence to show that when appellant got on the tractor he drove it ahead quickly. In passing deceased some of the big lugs caught Braseman's pants and threw or pushed him against the belt pully clutch. This belt pulley and clutch are attached to the fly wheel. Deceased's jacket got caught in the clutch and this clutch kept going. Deceased was thrown down on the cement and the big wheel with the lugs on it ran over his leg and smashed his arm and cut him inside. The witness Hepfinger grabbed for deceased, but the clutch was stronger than he was. There is evidence that Hepfinger "hollered" to appellant and told him deceased was down, but the tractor kept going; that after he "hollered" the tractor went 10, 12 or 14 feet before appellant stopped it. There is a hand wheel for steering the tractor; that is on the right hand side and in front of a person standing on the platform in the rear of the tractor. The only way the tractor can be steered is by turning this hand wheel.

Whether or not deceased was in the exercise of ordinary care and defendant was negligent were questions of fact to be determined by the jury from the evidence in the case.

Weighting the evidence is peculiarly the province of the jury and from the evidence stated above we are of the opinion that the jury were justified in finding that appellant was negligent and that deceased was in the exercise of ordinary care for his own safety at and just before the time of the accident and that we would not be justified in setting aside the verdict.

Appellant contends that the court erred in giving to the jury at the request of appellee the following instruction:

"As to the second count in the declaration, the court instructs the jury that if you believe from the evidence that the defendant knew that the plaintiff's intestate was in a

There is evidence to show that when appellant got on the tractor he drove it ahead quickly. In passing deceased some of the big lugs caught Freeman's pants and threw or pushed him against the belt pully clutch. This belt pulley and clutch are attached to the fly wheel. Deceased's jacket got caught in the clutch and this clutch kept going. Deceased was thrown down on the cement and the big wheel with the lugs on it ran over his leg and smashed his arm and cut him inside. The witness Hepfinger grabbed for deceased, but the clutch was stronger than he was. There is evidence that Hepfinger "hollered" to appellant and told him deceased was down, but the tractor was going; that after it "quitted" the tractor went 10, 12 or 14 feet before appellant stopped it. There is a hand wheel for steering the tractor; that is on the right hand side and in front of a person standing on the platform in the rear of the tractor. The only way the tractor can be steered is by turning this hand wheel.

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Appellant contends that the court erred in giving to the jury at the request of appellee the following instructions:

"As to the second count in the declaration, the court instructs the jury that if you believe from the evidence that the defendant knew that the plaintiff's intestate was in a

position of peril, that then as a matter of law, it became the duty of the defendant to use all reasonable care to avoid injury to him; and if you further believe from the evidence that the defendant failed so to do, and that thereby the plaintiff's intestate was injured, and came to his death, as charged in the second count of the declaration, then the defendant is deemed guilty of wanton and wilful negligence."

Deceased was in plain sight of appellant and only a few feet from him and while there is evidence in the case to the effect that after a tractor has started up and gone a couple of feet it could be stopped instantly there is evidence to the effect that after the pants of deceased were caught in the lugs of the tractor and the witness "hollered" to appellant the tractor moved forward several feet. This evidence was within the range covered by the second count of the declaration and the instruction stated the law correctly. King vs. Walldren Express Co. 391 Ill. 474; C W D Ry. Co. vs. Ryan, 131 Ill. 474; L.S.& M.S.Ry. Co. vs. Bodemer, 139 Ill. 596.

The judgment is affirmed.

position of peril, that then as a matter of law, it became the duty of the defendant to use all reasonable care to avoid injury to him; and if you further believe from the evidence that the defendant failed so to do, and that thereby the plaintiff's intestate was injured, and came to his death, as charged in the second count of the declaration, then the defendant is deemed guilty of wanton and willful negligence."

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The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 13th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson
Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Dan Van Matre, Appellant, vs. Overland Rockford Company, formerly Rockford Overland Company, Appellee.	Appeal from Winnebago.

Heard, J.

This is a suit in assumpsit brought by appellant against appellee. A jury trial resulted in a verdict for appellee upon which judgment was rendered, from which judgment appellant has appealed.

The Willys-Overland Co., of Toledo, O., was a manufacturer of automobiles. Appellee was a distributor of and dealer in such automobiles with headquarters and place of business at Rockford, Ill. Appellant was a sub-dealer or agent for the sale at retail of such automobiles, with headquarters and place of business at Lena, Ill.

On Sept. 4, 1915, appellee, as dealer, and appellant, as sub-dealer, entered into a written sales agreement for the 1916 season. This agreement among other things, provided for the purchase by appellant from appellee of 15 automobiles, three to be delivered in September, 1915, three in October 1915, and the remainder in 1916.

October 11, 1915, the parties entered into a second sales agreement for the 1916 season identical in terms with the agreement of September 4th, except that it provided for the purchase of twenty-five automobiles, three to be delivered in September 1915, four in October, 1915, and the remainder in 1916. Each of the agreements required that a deposit be made by the sub-dealer to be applied on the purchase price of the last car or on any indebtedness owing to the dealer by

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Appellant,

vs.

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the sub-dealer. A deposit of $400.00 was made at the time of making the September 4th agreement and when the October 11th agreement was made this was not returned, but was retained as a deposit under the October 11th agreement. Between the making of the September 4th agreement and that of October 11th three automobiles were shipped by appellee to appellant in September and three in October. After October 11, one car was shipped in October. The cars specified in the agreement were Model 83 Touring and Model 83 Roadster, but it was stated therein that in case the manufacturers of the automobiles were for any reason unable to manufacture the same in sufficient quantities to enable it to fill all its orders, it should have the right to make allotments of such automobiles as it was able to manufacture pro rata among all its customers, appellant included, based upon the number of automobiles purchased by each customer. It was also provided in the agreement that all prices on automobiles were subject to change upon written notice from the Willys-Overland company mailed to appellant either direct from the company or through the dealer.

About January 1, 1916, the Willys-Overland Co., placed upon the market a new car - Model 75, at the same time reducing the price of Model 83. They also issued a new price list and car allotment schedule of which due notice was given appellant as required by the agreement of October 11, 1915. Under the new allotment schedule 10, model 75's were allotted to each 25 car contract to take the place of 83's.

Shortly after January 1, 1916, appellee notified appellant that new written agreements would be required of sub-dealers and requested him to go to Rockford at once for that purpose. Appellant went to Rockford and had a talk with the president of appellee. There is a conflict

the sub-dealer. A deposit of $400.00 was made at the time of making the September 4th agreement and when the October 11th agreement was made this was not returned, but was retained as a deposit under the October 11th agreement. Between the making of the September 4th agreement and that of October 11th three automobiles were shipped by appellee to appellant in September and three in October. After October 11, one car was shipped in October. The cars specified in the agreement were Model 83 Touring and Model 85 Roadster, but it was stated therein that in case the manufacturers of the automobiles were for any reason unable to manufacture the same in sufficient quantities to enable it to fill all its orders, it should have the right to make allotments of such automobiles as it was able to manufacture pro rata among all its customers, appellant included, based upon the number of automobiles purchased by each customer. It was also provided in the agreement that all prices on automobiles were subject to change upon written notice from the Willys-Overland company mailed to appellant either direct from the company or through the dealer.

Since January 1, 1916, the Willys-Overland Co., placed upon the market a new car - Model 75, at the same time reducing the price of Model 83. They also issued a new price list and car allotment schedule of which due notice was given appellant as required by the agreement of October 11, 1915. Under the new allotment schedule 10, model 75's were allotted to each 25 car contract to take the place of 83's.

Shortly after January 1, 1916, appellee notified appellant that new written agreements would be required of sub-dealers and requested him to go to Rockford at once for that purpose. Appellant went to Rockford and had a talk with the president of appellee. There is a conflict

in the evidence as to what this talk was, appellee's president testifying that appellant agreed to sign the new written agreement and appellant denying that he agreed to sign it. The new agreement was not in fact signed.

About March 1, 1916, appellee shipped to appellant 18 automobiles, nine 83's and nine 75's. At the time of shipping these cars appellee drew upon appellant by sight drafts accompanied by statements of the purchase price of the cars. These drafts were paid by appellant. Appellant had previous to this time paid for the seven cars, received in September and October 1915.

April 8, 1916, appellant wrote appellee cancelling his contract and demanding a settlement within three or four days. No settlement was made at that time.

August 12, 1916, appellee and appellant entered into a new sales agreement under which two cars were shipped to appellant and paid for by him. October 19, 1916, appellant gave appellee the notice of the cancellation of the agreement required by its terms and requested settlement by October 29. October 27th, appellee's secretary wrote appellant saying that it would be impossible to settle by October 29th, but assuring him they would do the best they could in that respect. December 19th, 1916, appellee's secretary wrote appellant: "We are attaching hereto statements of your account which amount to $531.93. Your deposit amounts to $400 which leaves a balance in our favor of $131.93. Consequently at this writing we owe you nothing and will not until credit is received from the factory for the two motors shipped you some time ago". Subsequently credit was given appellant by appellee for these two motors and on January 8, 1919, appellee's secretary wrote appellant as follows:

in the evidence as to what this talk was, appellee's president testifying that appellant agreed to sign the new written agreement and appellant denying that he agreed to sign it. The new agreement was not in fact signed.

About March 1, 1916, appellee shipped to appellant 12 automobiles, nine 35's and nine 75's. At the time of shipping these cars appellee drew upon appellant by sight drafts accompanied by statements of the purchase price of the cars. These drafts were paid by appellant. Appellant had previous to this time paid for the seven cars, received in September and October 1915.

April 8, 1916, appellant wrote appellee cancelling his contract and demanding a settlement within three or four days. No settlement was made at that time.

August 12, 1916, appellee and appellant entered into a new sales agreement under which two cars were shipped to appellant and paid for by him. October 12, 1916, appellant gave appellee the notice of the cancellation of the agreement required by its terms and requested settlement by October 28. October 27th, appellee's secretary wrote appellant saying that it would be impossible to settle by October 28th, but assuring him they would do the best they could in that respect. December 18th, 1916, appellee's secretary wrote appellant: "We are attaching hereto statements of your account which amount to $531.93. Your deposit amounts to $400 which leaves a balance in our favor of $131.93. Consequently at this writing we owe you nothing and will not until credit is received from the factory for the two motors shipped you some time ago". Subsequently credit was given appellant by appellee for these two motors and on January 8, 1918, appellee's secretary wrote appellant as follows:

"The Willys-Overland Company have passed credit through this office for one motor assembly. The amount of this credit is $234.52, making a total credit due you of $417.83.

Please advise if you wish to accept our check for this amount."

Appellant did not accept the offer claiming that appellee was indebted to him for commissions, repair work, interest and other demands in addition to the amount conceded by appellee to be due appellant and on March 25, 1919, appellant brought this suit. With his declaration appellant filed in March 1919 an affidavit of claim, setting up that his demand was for a total of $775.03 made up of the following items. Balance on deposit, $400, interest thereon $48.44. Premium or rebate on last 18 automobiles contracted for and delivered $189.84; commission on two automobiles sold in appellant's territory, by another sub-dealer $101.60; amount paid for installing motors, $35.20.

No pleading was filed on behalf of appellee until May 8, 1920, when a plea of the general issue was filed supported by an affidavit of merit of F E Maynard, Esq., one of the attorneys for appellant, in which the defense set up as to the $400 item of appellant's claim was that appellant had been given credit for said sum on appellee's books and that charges for certain automobile parts furnished appellant amounted to a larger sum and that for that reason appellant was not entitled to recover the $400 or the item of interest thereon; that appellant was not entitled to the item of commission on the two automobiles sold in his territory by another sub-dealer because the claim was not made within the contract time limit; as to the item for installing motors it was not ordered by appellee and it had never agreed to pay the same and

"The Willys-Overland Company have passed credit through this office for our motor assembly. The amount of this credit is $32.75, making a total credit due you of $417.25.

Please advise if you wish to accept our check for this amount."

Appellant did not accept the offer claiming that appellee was indebted to him for commissions, repair work, interest and other demands in addition to the amount tendered by appellee to be due appellant and on March 25, 1919, appellant brought this suit. With his declaration appellant filed in March 1919 an affidavit of claim, setting up that his demand was for a total of $775.03 made up of the following items. Balance on account, $400, interest thereon $45.41. Freight or rebate on last 18 automobiles contracted for and delivered $129.84; commission on two automobiles sold in appellant's territory, by another sub-dealer $101.60; amount paid for installing motors, $25.20.

No pleading was filed on behalf of appellee until May 9, 1920, when a plea of the general issue was filed supported by an affidavit of merit of F E Maynard, Esq., one of the attorneys for appellant, in which the defense set up as to the $400 item of appellant's claim was that appellant had been given credit for said sum on appellee's books and that charges for certain automobile parts furnished appellant amounted to a larger sum and that for that reason appellant was not entitled to recover the $400 or the item of interest thereon; that appellant was not entitled to the item of commission on the two automobiles sold in his territory by another sub-dealer because the claim was not made within the contract time limit; as to the item for installing motors it was not ordered by appellee and it had never agreed to pay the same and

that as to the item of $199.64 commission the contract provided that appellant should sell twenty-five automobiles before he would be entitled to a premium or rebate and that appellant's declaration shows that appellant only sold 18 automobiles and therefore was not entitled to the premium or rebate. There was no claim in the affidavit of any other defense and therefore no other defense can be considered. Allen vs. Walt 69 Ill. 655; Harrison vs. Rosehill Cemetery Co., 391 Ill. 416.

May 17, 1920, appellee filed an unverified plea of set-off making as a partial basis of the plea that by the sales agreement of October 11, 1915, appellant was to sell 22 Model 83 touring cars and 3 model 83 roadsters and that the dealer's price of the touring cars was then $613 and the price of the roadsters $592; that the appellant on January 7, 1916, was requested in writing by the appellee to enter into a new contract regarding the sale of the new Model 75 cars that were then being manufactured by the Willys-Overland Company, and that the appellant thereafter agreed verbally to sign said contract at once; that appellee on the promise that appellant would sign a new contract allowed him to purchase Model 83 touring cars at the factory price of $581.53 under the contract to sell 25 cars, but appellant failed and refused to sign the new contract and cancelled his old contract on April 8, 1916, and had not then sold the 80 per cent of the 25 cars according to the terms of his contract, and that therefore the net price of the automobiles purchases, by reason of the failure to sell 80 per cent of the 25 cars amounts to $615 under the schedule for the sale of 15 cars, or under 20 cars; that the plaintiff sold 18 cars only, eight of these being model 75's for which he had not signed

that as the time of $1325.56 in consideration the contract provided that appellant should sell twenty-five automobiles before he would be entitled to a premium or rebate and that appellant's declaration shows that appellant only sold 18 automobiles and therefore was not entitled to the premium or rebate. There was no claim in the affidavit of any other defense and therefore no other defense can be considered. Allen vs. Hale 83 Ill. 223; Harrison vs. Phoenix Insurance Co., 193 Ill. 414.

May 17, 1920, appellee filed an unverified plea of set-off, making as a partial basis of the plea that by the sales agreement of October 11, 1918, appellant was to sell 22 Model 23 touring cars and 3 model 23 roadsters and that the dealer's price of the touring cars was then $818 and the price of the roadsters $788; that the appellant on January 7, 1919, was requested in writing by the appellee to enter into a new contract regarding the sale of the new Model 75 cars that were then being manufactured by the Willys-Overland Company, and that the appellant thereafter agreed verbally to sign said contract at once; that appellee on the promise that appellant would sign a new contract allowed him to purchase Model 23 touring cars at the factory price of $821.53 under the contract to sell 23 cars, but appellant failed and refused to sign the new contract and cancelled his old contract on April 5, 1919, and had not then sold the 20 per cent of the 23 cars according to the terms of his contract, and that therefore the net price of the automobiles purchases, by reason of the failure to sell 20 per cent of the 23 cars amounts to $615 under the schedule for the sale of 15 cars, or under 20 cars; that the plaintiff sold 12 cars only, eight of these being model 75's for which he had not signed

a contract as yet; that the other ten cars were Model 83's on which he was not entitled to the net price of $581.53; but was entitled to the factory price of $615. for each car; and that the difference between the price of $581.53, if the 25 cars were sold, and $615, the correct price for the cars sold by appellant, amounts to $334.70; that said sum from appellant is still due and owing appellee; that the credit memorandum made on February 28, 1916, was made under the new agreement and with the distinct understanding that appellant would sign the new agreement and fulfill the contract under which he was then working, or would take 80 per cent of 25 cars; and that upon the failure of appellant to abide by the contract and the cancellation on April 8, 1916, the credit memorandum was incorrect and does not represent the proper credit that should be given appellant, and that appellant was not entitled to credit shown on the memorandum by reason of his failure to carry out and perform the terms of his agreement with appellee; that appellant in order to get the sale price of $613 each on the first five Model 83s taken by him and the price of $894 on one Model 84 and an extra 2 per cent rebate, which amounted to $91.44 on his net sales, according to his written contract, would have to sell 80 per cent of 25 cars and this he did not do, but sold six cars until the cancellation of the contract on October 11, 1915, when he entered into a new contract for the sale of 83s and 84s; that under the new contract until his cancellation on April 8, 1916, appellant sold 11 Model 83s, making a total of 17 cars on the two contracts; and the net price for the sale of 15 cars or over, and less than 25, which appellant should pay is the sum of $615 on 16 Model 83s instead of $613 paid on six Model 83s and $581.53 paid

a statement to wit; that the other two cars were Model 83's on which he was not entitled to the net price of $821.58; but was entitled to the factory price of $815. for each car; and that the difference between the price of $821.58, if the 25 cars were sold, and $815, the correct price for the cars sold by appellant, amounts to $324.70; that said sum from appellant is still due and owing appellee; that the credit memorandum made on February 22, 1916, was made under the new agreement and with the distinct understanding that appellant would sign the new agreement and fulfill the contract under which he was then working, or would take 80 per cent of 25 cars; and that upon the failure of appellant to abide by the contract and the cancellation on April 8, 1916, the credit memorandum was incorrect and does not represent the proper credit that should be given appellant, and that appellant was not entitled to credit shown on the memorandum by reason of his failure to carry out and perform the terms of his agreement with appellee; that appellant in order to get the sale price of $815 each on the first five Model 83a taken by him and the price of $894 on one Model 84 and an extra 2 per cent rebate, which amounted to $31.44 on his net sales, according to his written contract, would have to sell 80 per cent of 25 cars and this he did not do, but sold six cars until the cancellation of the contract on October 11, 1915, when he entered into a new contract for the sale of 83a and 84a; that under the new contract until his cancellation on April 8, 1916, appellant sold 11 Model 83a, making a total of 17 cars on the two contracts; and the net price for the sale of 15 cars or over, and less than 25, which appellant should pay is the sum of $815 on 15 Model 83a instead of $815 paid on six Model 83a and $821.58 paid

on 10 Model 83s, and that $898 was the net price which appellant should pay for one Model 84, instead of $894; and that by reason of appellant's failure to carry out the terms of his contract as above set forth, and his failure to sell 80 per cent of 35 cars, and because of his failure to sign the contract for the sale amount of Model 75s, he has received credits that he was not entitled to recover under the terms of the contract, as aforesaid, to the amount of $443.14.

So far as this appeal is concerned the main questions are whether the six cars delivered in September and October prior to the making of the sales agreement of October 11, 1915, and the eighteen cars delivered in March 1916, were to be considered as having been delivered under the agreement of October 11, 1915.

While the officers of appelles testify that these cars were not delivered under the October 11 contract their testimony being merely conclusions of the witnesses was not competent and the determination of the question depends upon the construction to be placed upon the October 11 agreement.

Where a contract is plain and unambiguous in its terms it is to be construed by the court according to such terms without regard to any extraneous facts. Slethauer et al vs. Hamlin, 97 Ill. 312.

Where, however, there is any ambiguity in the contract or in any respect the intention of the parties is not made plain by the language which they have used, resort must be had to the rules of construction applicable to such case.

It is a well recognized rule that contracts should receive a reasonable interpretation, according to the intention of the parties entering into them if the intention can be gathered from the language of the contract read in the light of the circumstances surrounding the parties at the time of

on 10 Model 83a, and that $888 was the net price which appellant should pay for one Model 84, instead of $894; and that by reason of appellant's failure to carry out the terms of his contract as above set forth, and his failure to sell 80 per cent of 35 cars, and because of his failure to sign the contract for the sale amount of Model 75a, he has received credits that he was not entitled to recover under the terms of the contract, as aforesaid, to the amount of $448.14.

So far as this appeal is concerned the main questions are whether the six cars delivered in September and October prior to the making of the sales agreement of October 11, 1915, and the eighteen cars delivered in March 1916, were to be considered as having been delivered under the agreement of October 11, 1915.

While the officers of appellee testify that these cars were not delivered under the October 11 contract their testimony being merely conclusions of the witnesses was not competent and the determination of the question depends upon the construction to be placed upon the October 11 agreement.

Where a contract is plain and unambiguous in its terms it is to be construed by the court according to such terms without regard to any extraneous facts. Slatkamer et al. vs. [illegible], 47 Ill. 316.

Where, however, there is any ambiguity in the contract or in any respect the intention of the parties is not made plain by the language which they have used, resort must be had to the rules of construction applicable to such case.

It is a well recognized rule that contracts should receive a reasonable interpretation, according to the intention of the parties entering into them if the intention can be gathered from the language of the contract read in the light of the circumstances surrounding the parties at the time of

making the contract. Crabtree vs. Hagenbeck, 25 Ill. 233; Streeter vs. Streeter, 43 Ill. 155; Thoren vs. Wiggers, 41 Ill. 470.

Courts in construing written contracts endeavor in all cases, by extrinsic evidence, to place themselves in the position of the contracting parties, so that they may understand the language used in the sense intended by the parties using it. Doyle vs. Seas, 4 Scan. 202.

Where the parties to a contract have given it a particular construction which is reasonable such construction will generally be adopted by the court unless the terms used clearly show a contrary meaning. People ex rel vs. Masky, 119 Ill. 159; Cons. Coal Co. vs. Schneider, et al, 163 Ill. 393.

In construing a contract the intention is to be ascertained from the entire contract and not from any particular part of it and it is to be so construed as to give effect to every word of it, if possible. C. B. & Q. R.R. Co. vs. Aurora, 99 Ill. 205. City of Alton vs. Ill. Tra. Co. 12 Ill. 37.

The contract in question was prepared by appellee and it is a well recognized rule of construction of contracts that where there is any ambiguity in such a contract, the words used are to be construed most strongly against the party preparing the contract. McCarty vs. Howell, 24 Ill. 342.

Applying these rules of construction to this case there can be no question but what when the agreement of October 11, 1915, was entered into it was the intention of the parties that this agreement should simply change the agreement of September 4 as to the number of cars and in other respects it was to supersede and carry out the prior agreement and that whatever had been done under the agreement of September 4 should be considered as being part performance of the

making the contract. Crabtree vs. Hagenbeck, 35 Ill. 232; Streeter vs. Streeter, 43 Ill. 155; Thorson vs. Wiggers, 41 Ill. 470.

Courts in construing written contracts endeavor in all cases, by extrinsic evidence, to place themselves in the position of the contracting parties, so that they may understand the language used in the sense intended by the parties using it. Doyle vs. Sass, 4 Scam. 203.

Where the parties to a contract have given it a particular construction which is reasonable such construction will generally be adopted by the court unless the terms used clearly show a contrary meaning. People ex rel vs. Mealy, 119 Ill. 159; Cons. Coal Co. vs. Schneider, et al, 153 Ill. 393.

In construing a contract the intention is to be ascertained from the entire contract and not from any particular part of it and it is to be so construed as to give effect to every word of it, if possible. C. B. & Q. R.R. Co. vs. Aurora, 99 Ill. 205. City of Alton vs. Ill. Tra. Co. 12 Ill. 37.

The contract in question was prepared by appellee and it is a well recognized rule of construction of contracts that where there is any ambiguity in such a contract, the words used are to be construed most strongly against the party preparing the contract. McCarty vs. Howell, 24 Ill. 342.

Applying these rules of construction to this case there can be no question but that when the agreement of October 11, 1915, was entered into it was the intention of the parties that this agreement should simply change the agreement of September 4 as to the number of cars and in other respects it was to supersede and carry out the prior agreement and that whatever had been done under the agreement of September 4 should be considered as being part performance of the

October 11, 1915, contract. Any other construction would render nugatory the portion of the October 11, 1915, agreement requiring delivery of three cars in September 1915, and we therefore hold that the six cars delivered between September 4, 1915 and October 11, 1915, must be considered as being part performance of the October 11, 1915, agreement.

The agreement in question was not an agreement for the sale of any particular cars in praesenti at a particular price, but it was an agency contract giving to appellant in certain territory specified therein the exclusive right to sell the Willys-Overland motor vehicles of any kind and while it provided for the purchase of 25 automobiles of certain kinds at prices to be fixed by schedule of Willys-Overland company, attached to the agreement, it also provided that under certain conditions automobiles of other models might be substituted and that all prices on automobiles were subject to change on written notice from the Willys-Overland company.

There is no evidence in the record as to just what took place before the 18 automobiles were shipped or as to just why that particular number of cars were shipped or why they were shipped at that particular time.

At the time of such shipment the only contract between the parties was the contract of October 11, 1915. Even if it were true that the parties had agreed to enter into a new written agreement they had not done so and where parties intend that their verbal negotiations shall be reduced to writing, as the evidence of their agreement, there is nothing binding upon them until the writing is executed. 9 Cyc 280. Under the evidence in this case as it stands in the record we must hold that the 18 cars deliverd about March 1, 1916,

October 11, 1915, arrived. Any other construction would render nugatory the portion of the October 11, 1915, agreement requiring delivery of these cars in September 1916, and we therefore hold that the six cars delivered between September 4, 1915 and October 11, 1915, must be considered as being part performance of the October 11, 1915, agreement.

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were delivered under the October 11, 1915 agreement.

That this was the construction placed upon the transaction by the parties themselves is evidenced by the fact that although four years had elapsed from the time of the cancallation of the contract up to the time of the trial no claim of any set off was ever made to appellant or mentioned to anyone until it was filed in court four days before the trial but on the contrary appellee kept a book of account of his dealings with appellant which book, when produced in evidence, showed a balance in appellant's favor of $417.83, which agreed with appellee's letter of January 8, 1919, in which an indebtedness of that amount to appellee was admitted. This construction as to the 18 automobiles is also borne out by appellee's affidavit of merit.

Without attempting to state an account between the parties, we find that under the pleadings in the case the verdict of the jury was so manifestly against the weight of the evidence that the court should have granted a new trial and therefore the judgment is reversed and the cause remanded.

were delivered under the October 11, 1915 agreement.

That this was the construction placed upon the transaction by the parties themselves is evidenced by the fact that although four years had elapsed from the time of the cancellation of the contract up to the time of the trial no claim of any set off was ever made to appellant or mentioned to anyone until it was filed in court four days before the trial but on the contrary appellee kept a book of account of his dealings with appellant which book, when produced in evidence, showed a balance in appellant's favor of $417.83, which agreed with appellee's letter of January 5, 1916, in which an indebtedness of that amount to appellee was admitted. This construction as to the 18 automobiles is also borne out by appellee's affidavit of merit.

Without attempting to state an account between the parties, we find that under the pleadings in the case the verdict of the jury was so manifestly against the weight of the evidence that the court should have granted a new trial and therefore the judgment is reversed and the cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 13th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson
Clerk of the Appellate Court.

R. H. Lewis May 3, 1921 6881 (599a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Thomas Robinson and Hyman Robinson, co-partners doing business as Fort Dodge Iron & Metal Company, Appellees, vs. David Wine, doing business as Kewanee Iron & Metal Company, Appellant.	Appeal from City Court of Kewanee.

Heard, J.

Appellees are dealers in scrap iron at Fort Dodge, Iowa, and appellant is a dealer in the same commodity at Kewanee, Illinois. July 7, 1917 they entered into a written agreement with appellant as party of the first part and appellee as party of the second party, which provided "That whereas, the aforesaid parties have heretofore and on and to-wit, the dates hereinafter specified, entered into agreements in writing whereby said parties of the second part agreed to sell and deliver to said party of first part, said party of the first part agreed to purchase and receive and pay for from said party of the first part the material at and for the prices hereinafter mentioned; said contracts are hereby made a part of this agreement. Said contracts being more particularly described as follows:

Contract dated Feb. 22, 1917, calling for 300 tons of No. 1 Agricultural Machinery Cast Scrap at and for the price of $16.50 per net tone f. o. b. Kewanee, Ill., for shipment within ninety days from said date there being a balance due and unshipped on this contract of 259 tons, 800 lbs.

Contract dated April 2nd, 1917, calling for 300 tons of No. 1 Agricultural Machinery Cast Scrap, at and for the price of $21.00 per net ton f. o. b. cars Kewanee, Ill. for

Thomas Robinson and Hyman Rollison, co-partners doing business as Fort Dodge Iron & Metal Company, Appellees,	Appeal from City Court of Kewanee.
vs.	
David Wine, doing business as Kewanee Iron & Metal Company, Appellant.	

Heard, 1.

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Contract dated Feb. 22, 1917, calling for 300 tons of No. 1 Agricultural Machinery Cast Scrap, at and for the price of $16.50 per net tons f. o. b. Kewanee, Ill., for shipment within ninety days from said date there being a balance due and unshipped on this contract of 259 tons, 800 lbs.

Contract dated April 2nd, 1917, calling for 300 tons of No. 1 Agricultural Machinery Cast Scrap, at and for the price of $21.00 per net ton f. o. b. cars Kewanee, Ill. for

shipment within 90 days from said date, there being a balance of 246 tons and 1500 lbs. due on this contract.

Contract dated May 9th, 1917, calling for 300 tons of No. 1 Agricultural Machinery Cast Scrap, free from any chilled iron or burned iron, mine wheels or sewer pipe, material not to run over 200 pounds in weight, none of which said material has been shipped, said material to have been shipped within 90 days from said date at and for the price of $22.00 per net ton f. o. b. cars Kewanee, Ill.

Contract dated Feb. 22, 1917, calling for 300 tons of Agricultural Malleable Scrap at and for the price of $15.25 per ton, f. o. b. cars, Kewanee, Ill., for shipment within ninety days from said date, there being a balance due on this contract of 59 tons and 1600 pounds.

Contract dated March 12th, 1917, calling for 300 tons of No. 1 Agricultural Malleable Scrap, free from fittings and railroad malleable and also free from hubs cut out of wheels having cast attached to them, at and for the price of $16.00 per net ton f. o. b. cars, Kewanee, Ill., for shipment up to July 1st, 1917, there being a balance of 300 tons due on this contract and

Contract dated April 2nd, 1917, calling for 250 tons of Agricultural Malleable Scrap, free from fittings and railroad malleable hubs cut out of wheels, at and for the price of $18.00 per net ton, f. o. b. cars Kewanee, Illinois, shipment to be made within 120 days from said date, there being a balance of 250 tons due on this contract.

And Whereas, said parties of the second part have requested said party of the first part for an extension of 90 days from and after July 1st, 1917, in which to complete the tonnages due under these various contracts:

Now therefore in consideration of the foregoing, the following agreements are hereby entered into:

shipment within 90 days from said date, there being a balance of 246 tons and 1800 lbs. due on this contract.

Contract dated May 9th, 1917, calling for 300 tons of No. 1 Agricultural Machinery Cast Scrap, free from any chilled iron or burned iron, mine wheels or sewer pipe, material not to run over 200 pounds in weight, none of which said material has been shipped, said material to have been shipped within 90 days from said date at and for the price of $23.00 per net ton, f. o. b. cars Kewanee, Ill.

Contract dated Feb. 22, 1917, calling for 200 tons of Agricultural Malleable Scrap at and for the price of $15.25 per ton, f. o. b. cars, Kewanee, Ill., for shipment within ninety days from said date, there being a balance due on this contract of 39 tons and 1800 pounds.

Contract dated March 13th, 1917, calling for 300 tons of No. 1 Agricultural Malleable Scrap, free from fittings and railroad malleable and also free from tube out out of wheels having cast attached to them, at and for the price of $16.00 per net ton, f. o. b. cars, Kewanee, Ill., for shipment up to July 1st, 1917, there being a balance of 300 tons due on this contract and

Contract dated April 2nd, 1917, calling for 350 tons of Agricultural Malleable Scrap, free from fittings and railroad malleable tube out out of wheels, at and for the price of $18.00 per net ton, f. o. b. cars Kewanee, Illinois, shipment to be made within 120 days from said date, there being a balance of 350 tons due on this contract.

And Whereas, said parties of the second part have requested said party of the first part for an extension of 30 days from and after July 1st, 1917, in which to complete the tonnages due under these various contracts:

Now therefore in consideration of the foregoing, the following arrangements are hereby entered into:

(1) Said parties of the second part hereby agree to ship all of the balance due under the aforesaid contracts on or before October 1st, 1917, agreeing to ship same at the rate of not less than 100 tons per week.

(2) Said parties of the second part further agree that all material must be strictly up to grade called for in said contracts.

Terms: Sight draft for 90 per cent against invoice and bill of lading, after freight is deducted. Mill weights and gradings to govern all settlements. Balance on each car to be remitted for after receipt of mill weights and gradings.

(4) In event parties of second part are not able to ship sufficient malleable on above contracts, then privilege is hereby accorded them to ship No. 1 Agricultural Machinery Cast Scrap under said malleable contracts.

(5) In the event said parties of the second part shall in all respects comply with any, every, each and all of the conditions and agreements by them to be kept and performed under the terms of this agreement, then and at the end of the term of performance, towit, October 1st, 1917, the said party of the first part agrees to pay to said parties of the second part a bonus of $5000.00 in cash.

(6) In event of rejection of any of said material so shipped said parties of the second part hereby agree to replace any of said material so rejected.

(7) Time is of the essence of this agreement and shall be so contrued in every respect."

A trial resulted in an instructed verdict for appellees for $5,563.50 upon which judgment was rendered. From this judgment appellant has appealed.

The real question in the case and the only point urged by appellant is that neither the writing of July 7, 1917, on

(1) Said parties of the second part hereby agree to ship all of the balance due under the aforesaid contracts on or before October 1st, 1917, agreeing to ship same at the rate of not less than 100 tons per week.

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Terms: Sight draft for 90 per cent against invoice and bill of lading, after freight is deducted. Mill weights and gradings to govern all settlements. Balance on each car to be remitted for after receipt of mill weights and gradings.

(4) In event parties of second part are not able to ship sufficient material on above contracts, then privilege is hereby accorded them to ship No. 1 Agricultural Machinery Cast Iron Pulley and Hollow Spokes.

(5) In the event said parties of the second part shall in all respects comply with any, every, each and all of the conditions and reservations by them to be kept and performed under the terms of this agreement, then and at the end of the term of performance, to wit, October 1st, 1917, the said party of the first part agrees to pay to said parties of the second part a bonus of $8000.00 in cash.

(6) In event of rejection of any of said material so shipped said parties of the second part hereby agree to replace any of said material so rejected.

(7) Time is of the essence of this agreement and shall be so construed in every respect."

A trial resulted in an instructed verdict for appellees for $3,589.50 upon which judgment was rendered. From this judgment appellant has appealed.

The real question in the case and the only point urged by appellant is that neither the writing of July 7, 1917, on

which suit was brought nor the evidence discloses any consideration for appellant's promise to pay appellees the bonus of $5,000.00, mentioned in Clause Five of said writing. Appellant's position if based upon the principle of contracts that the performance of what one is already bound to do cannot form the consideration to support a promise, and his contention is that by the terms of the writing of July 7, 1917, appellees undertook nothing more than they were already bound to do under the six contracts entered into prior to that date and that therefore, there was no consideration for appellant's promise to pay appellees a bonus of $5,000.00.

It is undoubtedly the law that as a general rule a promise to do what the promisor is already bound to do or a promise to perform an existing legal obligation is not a valid consideration, and that a promise to pay additional compensation for the performance by the promisee of a contract which the promisor is already under obligation to the promisee to perform is without consideration. 13 Corpus Juris 351-353. 1 Beach on contracts 197.

It is however, the law that the right to contract includes the right to modify, change or abrogate a pre-existing contract and that a contract for such change, modification or abrogation, if supported by a consideration will bind the parties. Bishop vs. Busse et al 69 Ill. 403. Cooke vs. Murphy 70 Ill. 96. In the latter case the parties had entered into a contract for the erection of two buildings and thereafter before commencing the work the parties met and a verbal agreement was entered into by which the owner of the building was to pay $500.00 more, as the price of the work, than was mentioned in the written contract. In passing on the validity of this latter agreement the court said "The rule is familiar,

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that one promise is sufficient consideration to support another, and that where a person does any act beneficial to another, or agrees to do so, that forms a sufficient consideration to support an agreement. Here were mutual promises, one to perform labor, and to furnish materials, and the other to pay for them. Again, the performance of the labor and the furnishing materials were of benefit to appellant, and of loss and injury to appellees, and the new and additional contract was binding. Appellees refused to go on with and to perform the contract, and he agreed, if they would, he would pay them the additional sum."

In Bishop vs. Busses, supra, in which the appellee who had been employed by appellant to erect a building, finding himself unable to perform his contract without great loss owing to a rise in prices, informed his employer that he would not comply with his contract, and the employer directed him to go on and finish the work and he would pay him what was right for it, the supreme court in holding the new agreement valid and based on a sufficient consideration said, "Was there, then, a sufficient consideration to sustain the new contract? We think there was.

In this case, brick had risen from $15 in the wall to $22 or $23, and labor and materials had also advanced in the same proportion. And the evidence shows that if appellees had completed the building at the prices first agreed upon, they would have lost about $8000; that, on appellees failing to perform the contract, appellant could have recovered the damages occasioned by the breach. But this he may have considered of less advantage to him than the completion of the building, and if so, that of itself would have been sufficient consideration to support the new agreement. It is held that one promise is sufficient to support another,

that one promise is sufficient consideration to support another, and that where a person does any act beneficial to another, or agrees to do so, that forms a sufficient consideration to support an agreement. Here were mutual promises, one to perform labor, and to furnish materials, and the other to pay for them. Again, the performance of the labor and the furnishing materials were of benefit to appellant, and of loss and injury to appellees, and the new and additional contract was binding. Appellees refused to go on with and to perform the contract, and he agreed, if they would, he would pay them the additional sum."

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In this case, brick had risen from $15 in the wall to $20 or $25, and labor and materials had also advanced in the same proportion. And the evidence shows that if appellees had completed the building at the prices first agreed upon, they would have lost about $8000; that, on appellees failing to perform the contract, appellant could have recovered the damages occasioned by the breach. But this he may have considered of less advantage to him than the completion of the building, and if so, that of itself would have been sufficient consideration to support the new agreement. It is held that one promise is sufficient to support another.

and that where a party will derive a benefit from the performance of a contract, that is a consideration for a promise to pay for such benefit."

It has been frequently held that any act which is a benefit to one party or a disadvantage to the other constitutes a sufficient consideration to support a contract. Buchanan vs. International Bank 78 Ill. 500. Burch vs. Hubbard 48 Ill. 164. Kran vs. Hamilton 205 Ill. 191. People vs. Com. Ins. Co. 249 Ill. 92.

In the present case the evidence does not disclose why the former contracts were not completely exeduted nor what reasons the parties had for entering into the new agreement but it is a matter of general knowledge that between the time of the making of the former contracts and the contract of July 7, 1917, the United States had declared that a state of war existed with Germany and that market conditions had changed generally.

The former contracts were not introduced in evidence and are not set out in their entirety in the new contract, but the new contract does purport to set forth the material provisions of the old contracts. A comparison of these provisions with the provisions of the new contract discloses the fact that the new contract contains a number of provisions not contained in the old and that at least the provisions contained in specifications 2 - 3 and 6 in the new agreement above set forth and not contained in the old contracts are beneficial to appellant.

The parties in this case were competent to contract. There is no question of fraud. At least some of the provisions of the new contract were beneficial to appellant. Whether or not these benefits were adequate to warrant appellant to

and that where a party will derive a benefit from the performance of a contract, that is a consideration for a promise to pay for such benefit."

It has been frequently held that any act which is a benefit to one party or a disadvantage to the other constitutes a sufficient consideration to support a contract. Bowman vs. International Bank 78 Ill. 500. Baron vs. Hubbard 48 Ill. 164. Kren vs. Hamilton 208 Ill. 191. People vs. Con. Ins. Co. 249 Ill. 92.

In the present case the evidence does not disclose why the former contracts were not specifically rescinded but reasons the parties had for entering into the new agreement but it is a matter of general knowledge that between the time of the making of the former contracts and the contract of July 7, 1917, the United States had declared that a state of war existed with Germany and that market conditions had changed generally.

The former contracts were not introduced in evidence and are not set out in their entirety in the new contract, but the new contract does purport to set forth the material provisions of the old contracts. A comparison of these provisions with the provisions of the new contract discloses the fact that the new contract contains a number of provisions not contained in the old and that at least the provisions contained in specifications 2 - 3 and 8 in the new agreement above set forth and not contained in the old contracts are beneficial to appellant.

The parties in this case were competent to contract. There is no question of fraud. At least some of the provisions of the new contract were beneficial to appellant. Whether or not these benefits were adequate to merited consideration is

agree to pay appellees the $5000 bonus for completing the contract was a question for appellant at the time of making the contract and not for the court when it is sought to be enforced in law. McArtee vs. Engert 13 Ill. 242; Adams vs. Peabody Coal Co. 230 Ill. 469.

With the wisdom or folly of contracts, courts of law have no concern. Florida Ass'n. vs. Stevens 61 Fla. 598; Mizell L.S. Co. vs. I. J. M. Co. 51 Sa. 547.

Appellant for a consideration sufficient in law, without any fraud on appellees' part, agreed to pay appellees the bonus of $5,000. upon the completion of the contract. The contract was fully carried out by appellees and appellees were therefore, on the undisputed facts in the case, entitled to recover such bonus.

The judgment is therefore affirmed.

agree to pay appellees the $5000 bonus for completing the contract was a question for appellant at the time of making the contract and not for the court when it is sought to be enforced in law. McArtee vs. Engert 13 Ill. 242; Adams vs. Peabody Coal Co. 220 Ill. 489.

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Appellant for a consideration sufficient in law, without any fraud on appellees' part, agreed to pay appellees the bonus of $5,000. upon the completion of the contract. The contract was fully carried out by appellees and appellees were therefore, on the undisputed facts in the case, entitled to recover such bonus.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, ~~CHRISTOPHER LUDEWY~~ JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 13th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson

Clerk of the Appellate Court.

6888 (6009)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Jennie Fannon, Administratrix of the Estate of Robert Chester Fannon, Deceased, Appellee vs. Gus O. Morton, Appellant.	Appeal from Winnebago

Heard, J.

Robert C. Fannon, a boy eight years and three months of age was killed by coming in contact with a Dodge truck, weighing 2100 pounds, belonging to appellant and driven by his son at a place on North Main St. Rockford, Ill. where Fisher Ave. comes up to but does not cross N. Main St. Suit was brought by appellee to recover damages, caused by his death, to his next of kin. A trial was had upon appellee's declaration, consisting of five counts, and appellant's plea of the general issue. The first count charged defendant with general negligence in the running, management and control of the truck. The second count was a charge of wilful and wanton negligence. The third count alleged negligence in running the automobile at a rate of speed in violation of the law of Illinois. The negligence charged in the 4th count was that the truck was driven to the west or left side of the center of the beaten path of said street contrary to law. The 5th count alleged a failure to sound a horn or give warning of the approach of appellant's truck. The trial resulted in a judgment in favor of appellee against appellant for $1500.00 damages and costs from which judgment this appeal is taken.

Appellee in making out its case in chief offered no evidence as to the exercise of any care on the part of the deceased although there were eye witnesses to the accident. The only one of appellee's witnesses who testified to seeing deceased at or

Jennie Fannon, Administratrix of the Estate of Robert Chester Fannon, Deceased, Appellee va. Guy O. Morton, Appellant.	Appeal from Winnebago

Hon. J.

Robert C. Fannon, a boy eight years and three months of age was killed by coming in contact with a Dodge truck, weighing 2100 pounds, belonging to appellant and driven by his son at a place on North Main St. Rockford, Ill. where Fisher Ave. comes up to but does not cross N. Main St. Suit was brought by appellee to recover damages, caused by his death, to his next of kin. A trial was had upon appellee's declaration, containing of five counts, and appellant's plea of the general issue. The first count charged defendant with general negligence in the running, management and control of the truck. The second count was a charge of wilful and wanton negligence. The third count alleged negligence in running the automobile at a rate of speed in violation of the law of Illinois. The negligence charged in the 4th count was that the truck was driven to the west or left side of the center of the beaten path of said street contrary to law. The 5th count alleged a failure to sound a horn or give warning of the approach of appellant's truck. The trial resulted in a judgment in favor of appellee against appellant for $1500.00 damages and costs from which judgment this appeal is taken.

Appellee in making out its case in chief offered no evidence as to the exercise of any care on the part of the deceased although there were eye witnesses to the accident. The only one of appellee's witnesses who testified to seeing deceased at or

near the place of the accident prior to the accident was Walter E. Brown who testified, "I didn't see the boy before the machine hit him - didn't see where he came from . I saw the boy just for an instant, The car passed over him." In appellees case in chief, no witness was asked as to whether or not a horn was sounded or signal given, and no witness was asked to give and no witness gave opinion as to how fast appellant's truck was going at the time of or prior to the accident and no witness testified or gave an opinion that it was going fast. The only witness on appellee's case in chief who was interrogated on that subject was the witness Brown on cross examination and he said he could not say how fast the machine was going.

Appellee's only witnesses who gave testimony bearing upon the question of appellant's control, management of the truck at the time of and prior to the accident were the witnesses Brown, Mrs. Harry Peterson and Dr. Rogers. Brown said that he did not recollect of seeing the machine at all previous to the impact; that the machine swaying to one side was what first called his attention to the boy; that he saw the car sway to one side trying to miss the child: that just about the time the car hit the boy he saw the machine kind of duck -- swerve to the left as if to avoid the boy. Mrs. Peterson testified that the first thing she noticed was an automobile swaying from one side to the other. There was evidence that after the accident the car went from 30 to 60 feet. Dr. Rogers testified that there were marks of tires dragging in the road; that he stepped off these marks and found the distance to be approximately twelve paces, which in his judgment was thirty, thirty-five or forty feet. He also testified that Harold Morton, the driver of the truck, told him that he set his brakes as soon as he saw the boy in front of him and stopped as quickly as possible.

Appellant called two eye witnesses. Harold Morton and Ray

near the place of the accident prior to the accident was Walter E. Brown who testified, "I didn't see the boy before the machine hit him - didn't see where he came from . I saw the boy just for an instant, The car passed over him." In appellee's case in chief, no witness was asked as to whether or not a horn was sounded or signal given, and no witness was asked to give and no witness gave opinion as to how fast appellant's truck was going at the time of or prior to the accident and no witness testified or gave an opinion that it was going fast. The only witness on appellee's case in chief who was interrogated on that subject was the witness Brown on cross examination and he said he could not say how fast the machine was going.

Appellee's only witnesses who gave testimony bearing upon the question of appellant's control, management of the truck at the time of and prior to the accident were the witnesses Brown, Mrs. Harry Peterson and Dr. Rogers. Brown said that he did not recollect of seeing the machine at all previous to the impact; that the machine swerving to one side was what first called his attention to the boy; that he saw the car away to one side trying to miss the child: that just about the time the car hit the boy he saw the machine kind of duck -- swerve to the left as if to avoid the boy. Mrs. Peterson testified that the first thing she noticed was an automobile swerving from one side to the other. There was evidence that after the accident the car went from 20 to 60 feet. Dr. Rogers testified that there were marks of tires dragging in the road; that he stepped off these marks and found the distance to be approximately twelve paces. His judgment was thirty, thirty-five or forty feet. He also testified that Harold Morton, the driver of the truck, told him that he set his brakes as soon as he saw the boy in front of him and stopped as quickly as possible.

Appellant called two eye witnesses. Harold Morton and Ray

C. Widholm. Harold Morton testified that on the afternoon in question he was driving the Dodge truck; that when he got to the intersection of Fisher avenue and N. Main St., he turned to the left and sounding his Klaxon, was passing some show wagons, five or six in number, which were also going north, each wagon being drawn by two teams of horses, about four feet east of the center of N. Main street; that after he had passed the second wagon he was about four feet to the side of the wagons when a little boy suddenly ran out directly in front of him; that he tried to avoid hitting him, but some part of the front of the car, either the radiator or bumper, struck him; that the car did not run over him; that the boy ran right in front of the truck; that he was running low - - - crouched down; that the Dodge truck was going about twelve or fourteen miles an hour; that the reason he knew he was going twelve or fourteen miles an hour was because he had cleaned the spark plugs that morning and he was watching the speed; that as soon as he saw the boy he put on the brakes; that he did not think he had thrown out the clutch completely, so that the engine just moved on after he had the brakes on; that he pulled up the emergency brake; that the engine was still pulling while the brakes were on; that it pulls until the engine is killed even though the emergency brake is locked; and that the car went about five feet after the engine was killed.

Ray Widholm testified that he was driving a truck going south and was about four feet north and five or six feet to the left of the Morton truck at the time of the impact; that Mr. Morton was driving between twelve and fifteen miles per hour about three feet from the line of the circus wagons; that he saw the boy running through between the wagons; that the distance between the boy and the circus wagons was short;

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Ray Widholm testified that he was driving a truck going south and was about four feet north and five or six feet to the left of the Morton truck at the time of the impact; that Mr. Morton was driving between twelve and fifteen miles per hour about three feet from the line of the circus wagons; that he saw the boy running through between the wagons; that the distance between the boy and the circus wagons was about;

that it was about a second from the instant he saw the boy step in front of the truck to the time he was struck; that he saw the boy run between the circus wagons and that he was running fast at the time he was hit,

Neither appellant nor appellee produced any evidence as to how far a Dodge truck would go at any rate of speed after the application of the brakes and under the circumstances shown by the evidence and this is not a matter of common knowledge of which a court can take judicial notice.

At the close of appellee's evidence, appellant moved the court to instruct the jury to find the defendant not guilty, which motion was denied. The motion was renewed at the close of all of the evidence and again denied. The action of the court in this regard was not questioned upon the motion for new trial and therefore, cannot now be considered.

As will be observed from the evidence which we have quoted the case was not a clear one, but was one in which the question of appellant's liability was very close and it was therefore imperative that the instructions given to the jury should be accurate and that no instructions be given which might have a tendency to mislead the jury.

At the request of appellee the court gave to the jury the following instruction:

"The court instructs the jury that it is the statute law of this state that no person shall drive a motor vehicle upon any public highway in the state ata speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person, and you are instructed that if the rate of speed of any motor vehicle upon any public highway where the same passes through the residence portions of an incorporated city, town or village exceeds fifteen miles per hour, such

that it was about a second from the instant he saw the boy stop in front of the truck to the time he was struck; that he saw the boy run between the circus wagons and that he was running fast at the time he was hit.

Neither appellant nor appellee produced any evidence as to how far a Dodge truck would go at any rate of speed after the application of the brakes and under the circumstances shown by the evidence and this is not a matter of common knowledge of which a court can take judicial notice.

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At the request of appellee the court gave to the jury the following instruction:

"The court instructs the jury that it is the statute law of this state that no person shall drive a motor vehicle upon any public highway in the state at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person, and you are instructed that if the rate of speed of any motor vehicle upon any public highway where the same passes through the residence portions of an incorporated city, town or village exceeds fifteen miles per hour, such

rate of speed is prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person."

This instruction was a mere abstract proposition of law and was not so worded as to apply to the facts of the case and while an instruction of such character is entirely proper in a case in which there is evidence upon which to base it, it was improper to give the latter portion of the instruction in a case like the present one, in which there is no evidence of a speed greater than fifteen miles per hour, as it would most likely mislead the jury and cause them to believe that in the opinion of the court there was such evidence.

The court also gave to the jury the following instruction:

"The court instructs the jury that in an action brought to recover damages which are alleged to have been caused by running a motor vehicle propelled by mechanical power on a public highway in this state where the same passes through the residence portions within the limits of any incorporated city, town or village, the plaintiff is deemed to have made out a prima facie case of negligence on the part of the defendant, if the jury believe from the evidence that the person operating such motor vehicle for said defendant, was at the time of the injury running the same at a rate of speed in excess of fifteen miles per hour."

The giving of this instruction was also erroneous as being misleading and not based upon the evidence. This instruction was also erroneous in stating "that the plaintiff is deemed to have made out a prima facie case of negligence on the part of the defendant if the jury believe from the evidence that the person operating such motor vehicle for said defendant, was at the time of the injury running the same at a rate of speed in

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The court also gave to the jury the following instruction:

"The court instructs the jury that in an action brought to recover damages which are alleged to have been caused by running a motor vehicle propelled by mechanical power on a public highway in this state where the same passes through the residence portions within the limits of any incorporated city, town or village, the plaintiff is deemed to have made out a prima facie case of negligence on the part of the defendant, if the jury believe from the evidence that the person operating such motor vehicle for said defendant, was at the time of the injury running the same at a rate of speed in excess of fifteen miles per hour."

The giving of this instruction was also erroneous as being misleading and not based upon the evidence. This instruction was also erroneous in stating "that the plaintiff is deemed to have made out a prima facie case of negligence on the part of the defendant if the jury believe from the evidence that the person operating such motor vehicle for said defendant, was at

in excess of fifteen miles". The court in instructions 1 and 2 having used the word "case" as equivalent to "right of recovery" the jury would most likely consider that when used in the instruction in question it was used in the same sense. That this is true is evidenced by the fact that appellant's counsel placed that construction upon the term in their argument in this court when attempting to justify the giving of this instruction. The statute was "the plaintiff shall be deemed to have made out a prima facie case by showing the fact of such injury and that the person or persons driving such motor vehicle, or motor bicycle was at the time of such injury running the same at a speed greater than was reasonable and proper having a regard for the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person". The section of the statute quoted in the instruction first above quoted tells what shall be prima facie evidence of negligence while the section last above quoted makes a different requirement in stating when a plaintiff shall be deemed to have made a prima facie case. Under this statute before a plaintiff shall be deemed to have made out a prima facie case he must show more than prima facie evidence, for when the evidence is all considered together the prima facie case may be overcome. The evidence to make out a prima facie case must show the injury and not merely a running at fifteen miles per hour, but when it is all considered together it must show that the person operating such motor vehicle was running at a rate of speed greater than was reasonable having regard to the traffic and the use of the way or so as to endanger the life or limb or injury the property of some person.

The cause will be reversed and remanded.

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The cause will be reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, ~~CHRISTOPHER C. DUFFY~~ JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 13th day of April in the year of our Lord one thousand nine hundred and twenty one.

Justus L. Johnson

Clerk of the Appellate Court.

6833 (60/a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6833 Agenda 24.

Lawrence S. Cusick by Frank C. Cusick, his next friend, Appellee.	)	
vs.	)	Appeal from Bureau.
George L. Hoffman, Gerard Kinkin and Peter Mattioda, Appellants.	)	

Niehaus, J.

This case was commenced in assumpsit in the circuit court of Bureau county by Lawrens S. Cusick, by his next friend Frank C. Cusick, against the appellants, George L. Hoffman, Gerard Kinkin and Peter Mattioda of Spring Valley, to recover the sum of $1500.00 which it is alleged the appellee paid the appellants as part of the purchase price of three moving picture shows in the city of Spring Valley. It appears from the evidence that the appellee in the month of July 1916, came to Spring Valley with a real estate and loan broker by the name of Dennis Fielding, and entered into negotiations with the appellants, for the purchase of the three picture shows in question, which negotiations resulted in appellee purchasing the same from the appellants for $3500.00. $1500.00 of the purchase price was to be paid in cash; and two promissory notes were to be given for the balance, each being for the sum of $1050.00, payable respectively in one and two years after date, and were to be secured by chattel mortgage on the property purchased. The appellee did not have the $1500.00 which was to be paid; and an arrangement was thereupon made by which the necessary money was raised by mortgaging an interest which appellee's wife had in a La Salle county farm. Dennis Fielding loaned the money and took a mortgage therefor; and of the money thus obtained he retained the $1500.00 and paid it over to the appellants. It is clear from the appellee's own testimony that Fielding in this transaction acted for his wife, and he testified that he never

No. 8833. Agenda 24.

Lawrence S. Cusick by Frank C. Cusick, his next friend, Appellee.	
vs.	Appeal from Bureau.
George L. Hoffman, Gerard Kimmin and Peter Mattioda, Appellants.	

Mr. JUSTICE [illegible].

This case was commenced in assumpsit in the circuit court of Bureau county by Lawrence S. Cusick, by his next friend Frank C. Cusick, against the appellants, George L. Hoffman, Gerard Kimmin and Peter Mattioda of Spring Valley, to recover the sum of $1500.00 which it is alleged the appellee paid the appellants as part of the purchase price of three moving pictures shows in the city of Spring Valley. It appears from the evidence that the appellee in the month of July 1916, came to Spring Valley with a real estate and loan broker by the name of Dennis Fielding, and entered into negotiations with the appellants, for the purchase of the three picture shows in question, which negotiations resulted in appellee purchasing the same from the appellants for $8000.00. $1500.00 of the purchase price was to be paid in cash; and two promissory notes were to be given for the balance, each being for the sum of $1050.00, payable respectively in one and two years after date, and were to be secured by chattel mortgage on the property purchased. The appellee did not have the $1500.00 which was to be paid; and an arrangement was thereupon made by which the necessary money was raised by mortgaging an interest which appellee's wife had in a La Salle county farm. Dennis Fielding loaned the money and took a mortgage therefor; and of the money thus obtained he retained the $1500.00 and paid it over to the appellants. It is clear from the appellee's own testimony that Fielding in this

at any time had possession or control of the $1500.00; and that Fielding refused to let him have it. He emphasizes the matter of Fielding's agency in the transaction on redirect examination when his counsel asked him this question: "Was Dennis Fielding acting in any capacity for you or as your agent," to which he replied "Dennis Fielding never acted as my representative." And the further question was asked him, "Was he your agent?" To which he answered, "Or agent, no." When Fielding paid over the money, the sale in question was consummated, and the appellee executed notes and a chattel mortgage for the remainder of the purchase price, and thereupon took possession of the picture shows as owner thereof on September 1st, 1916, and operated them until December 3rd, 1916; then he turned the entire property over to Lewis Murphy for the sum of $20.00. The appellee seeks to recover the $1500.00 paid on the ground that at the time he made the purchase of the picture shows, he was a minor, and had since that time disaffirmed the contract of sale; and furthermore; that he was unable to return the property to the appellants, having disposed of the same in the manner heretofore indicated. There was a trial by jury, which resulted in a verdict and judgment for appellee for the $1500.00 claimed; and this appeal is prosecuted from the judgment.

It is not necessary to discuss or determine all the various questions raised by appellants, which are urged as grounds for a reversal of the judgment, inasmuch as it clearly appears from the evidence referred to, that the appellee did not pay the $1500.00 which he sues to recover; and that the $1500.00 was not his money, but was the money of his wife; and that it was she who through Fielding paid it to appellants. Assuming therefore, that the appellee under the circumstances concerning his minority here presented, would have a legal right to disaffirm the sale in question, and to recover any money which he paid for the property purchased, this right to sue for and recover

at any time had possession or control of the $1500.00; and that Fielding refused to let him have it. He emphasizes the matter of Fielding's agency in the transaction on redirect examination when his counsel asked him this question: "Was Dennis Fielding acting in any capacity for you or as your agent," to which he replied "Dennis Fielding never acted as my representative." And the further question was asked him, "Was he your agent?" To which he answered, "Or agent, no." When Fielding paid over the money, the sale in question was consummated, and the appellee executed notes and a chattel mortgage for the remainder of the purchase price, and thereupon took possession of the picture show as owner thereof on September 1st, 1918, and operated them until December 3rd, 1918; then he turned the entire property over to Lewis Murphy for the sum of $20.00. The appellee seeks to recover the $1500.00 paid on the ground that at the time he made the purchase of the picture shows, he was a minor, and had since that time disaffirmed the contract of sale; and furthermore; that he was unable to return the property to the appellants, having disposed of the same in the manner heretofore indicated. There was a trial by jury, which resulted in a verdict and judgment for appellee for the $1500.00 claimed; and this appeal is prosecuted from the judgment.

It is not necessary to discuss or determine all the various questions raised by appellants, which are urged as grounds for a reversal of the judgment, inasmuch as it clearly appears from the evidence referred to, that the appellee did not pay the $1500.00 which he sues to recover; and that the $1500.00 was not his money, but was the money of his wife; and that it was she who through Fielding paid it to appellants. Assuming therefore, that the appellee under the circumstances concerning his minority here presented, would have a legal right to disaffirm the sale in question, and to recover any money which he paid

does not extend to the recovery of some other person's money; nor to the recovery of his wife's money which she invested in the enterprise in question.

The judgment is therefore reversed.

Finding of facts to be incorporated in the judgment: We find that the money sued for in this case, which was paid on the purchase made by appellee, was not appellee's money, nor paid by him to the appellants; but that it was the money of his wife and paid by her.

Judgment reversed.

does not extend to the recovery of some other person's money; nor to the recovery of his wife's money which she invested in the stocks in question.

The judgment is therefore reversed.

Finding of facts to be incorporated in the judgment:

It did not appear that the money sued for in this case, which was paid on the purchase made by appellee, was not appellee's money, nor paid by him to the appellants; but that it was the money of his wife and paid by her.

Judgment reversed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 13th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson
Clerk of the Appellate Court.

6845 (6029)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6845 Agenda 3

Joseph Combs, Appellee;	)	
vs.	)	
The Johnson - Moody Co., Appellant.	)	Appeal from Peoria

Niehaus, J.

This is a suit brought by Joseph Combs in the circuit court of Peoria county against the Johnson - Moody Co. to recover damages for personal injuries suffered by the appellee resulting from alleged negligence in the operation of appellant's automobile, in consequence of which it is alleged, the automobile collided with a car driven by the appellee. The collision occurred on September 6, 1919 about nine o'clock in the evening at the intersection of Franklin street and Seventh Avenue in the city of Peoria. There was a trial by jury which resulted in a verdict against the appellant, and an assessment of appellee's damages at $1000.00. Judgment was rendered in accordance with the verdict; and this appeal is prosecuted from the judgment.

Two questions are presented on this appeal for review. It is contended, that the court erred in refusing an instruction concerning a certain custom prevailing among automobile drivers in making a turn at street intersections. The rule of law concerning the necessary proof to establish a custom is clearly stated in Bissell v. Ryan 23 Ill. 566; and has been repeatedly reaffirmed in subsequent decisions by the courts of review in this state. To establish a custom it must be proven to be general and uniform in character, and so long established as to warrant the inference, that the party against whom the right is claimed had a knowledge of it; Turner v. Dawson 50

Joseph Combs, Appellee, va. The Johnson - Moody Co., Appellant.	Appeal from Peoria

Syllabus.

This is a suit brought by Joseph Combs in the circuit court of Peoria county against the Johnson - Moody Co. to recover damages for personal injuries suffered by the appellee resulting from alleged negligence in the operation of appellant's automobile, in consequence of which it is alleged, the automobile collided with a car driven by the appellee. The collision occurred on September 6, 1912 about nine o'clock in the evening at the intersection of Franklin street and Seventh Avenue in the city of Peoria. There was a trial by jury which resulted in a verdict against the appellant, and an assessment of appellee's damages at $1000.00. Judgment was rendered in accordance with the verdict; and this appeal is prosecuted from the judgment.

Two questions are presented on this appeal for review. It is contended, that the court erred in refusing an instruction concerning a certain custom prevailing among automobile drivers in making a turn at street intersections. The rule of law concerning the necessary proof to establish a custom is clearly stated in Kissell v. Ryan 23 Ill. 566; and has been repeatedly reaffirmed in subsequent decisions by the courts of review in this state. To establish a custom it must be proven to be general and uniform in character, and so long established as to warrant the inference, that the party against whom the right is claimed had knowledge of it; Turner v. Dawson 10

Ill. 85; Coffman v. Campbell 87 Ill. 98; C.C. & St. L. Co. v. Jenkins 174 Ill. 398; Handalman v. C. & N. W. R'y Co. 153 Ill. App. 169. The evidence adduced by the appellant on the trial was clearly insufficient to meet the requirements of the rule. The only evidence on the subject was that of appellant; and to the effect, that at the time of the collision there was a custom by automobile drivers to signal by stretching out the hand either way, to designate the manner and direction in which the automobile driver signaling was going to turn. It does not appear from this evidence that this custom prevailed generally throughout the city; nor that it had existed for any length of time. There was therefore no evidentiary basis for the instruction requested. But there is also another reason why the instruction was properly refused. By the instruction it is left to the jury to determine a question of law, namely, whether or not the failure to observe the custom referred to was negligence.

The other contention of appellant is, that the amount of damages in the judgment is excessive. Whether the amount fixed is excessive depends upon the extent of appellee's injuries. The physician who attended the appellee after his injuries, and who treated him therefor, testified in reference to these injuries, as follows: "His injury was a dislocated shoulder and a badly bruised set of muscles in the right upper arm. It was the right shoulder which was dislocated. There is only one joint in the right shoulder, and it was the head of the arm which was dislocated. I reduced it. Later on he lost the power of the arm entirely for a while. I put his arm in a sling and it was kept in the sling six weeks. Other injuries developed later. The injury to the musculospiral nerve resulted in complete loss of power of the forearm for a while.

Ill. 85; Coffman v. Campbell 27 Ill. 98; C.C. & St. L. Co. v. Jenkins 174 Ill. 398; Handelman v. O. & K. W. R'y Co. 153 Ill. App. 169. The evidence adduced by the appellant on the trial was clearly insufficient to meet the requirements of the rule. The only evidence on the subject was that of appellant; and to the effect, that at the time of the collision there was a custom by automobile drivers to signal by stretching out the hand either way, to designate the manner and direction in which the automobile driver signalling was going to turn. It does not appear from this evidence that this custom prevailed generally throughout the city; nor that it had existed for any length of time. There was therefore no evidentiary basis for the instruction requested. But there is also another reason why the instruction was properly refused. By the instruction it is left to the jury to determine a question of law, namely, whether or not the failure to observe the custom referred to was negligence.

The other contention of appellant is, that the amount of damages in the judgment is excessive. Whether the amount fixed is excessive depends upon the extent of appellee's injuries. The physician who attended the appellee after his injuries, and who treated him therefor, testified in reference to these injuries, as follows: "His injury was a dislocated shoulder and a badly bruised set of muscles in the right upper arm. It was the right shoulder which was dislocated. There is only one joint in the right shoulder, and it was the head of the arm which was dislocated. I reduced it. Later on he lost the power of the arm entirely for a while. I put his arm in a sling and it was kept in the sling six weeks. Other injuries developed later. The injury to the musculospiral nerve resulted in complete loss of power of the forearm for a while.

This injury was not apparent that morning. I treated him for it later. I first noticed the injury to the musculospiral nerve about two weeks later. He commenced suffering intense pain and the absolute loss of power of the lower forearm. He lost the use of the forearm. This and the pain I have spoken of was the result of the accident. In treating the arm and relieving the pain I used the usual remedies. I put the arm at rest and gave analgesics, pain remedies. I did not give him morphine. I did not put him to bed. The absolute rest of the forearm continued about two weeks. He called at my office about four times a week. He could walk around but he suffered pain continually. Later the arm got better but it never recovered its entire function. I have examined him about half an hour ago. I treated his arm until October 24th, that is, about six weeks. He has not yet fully recovered the use of the arm. At the present time the arm has about 50 per cent of its power and about 50 per cent of its motion which is due to a neuritis developed from an injury to the nerves. I cannot tell how long it will be before he will recover the full use of that arm or whether he will ever recover, nor can any one tell at this time. It may be permanent. In my judgment it will be from six months to a year before he gets any more substantial improvement in that arm. * * * * * * He was continually in pain during the time I treated him." The jury were warranted in taking the physician's statement as a true description of appellee's injuries and sufferings. And in this view of the matter the amount found by the jury cannot justly be considered as excessive. The judgment is affirmed.

Judgment affirmed.

This injury was not apparent that morning. I treated him for it later. I first noticed the injury to the musculospiral nerve about two weeks later. He commenced suffering intense pain and the absolute loss of power of the lower forearm. He lost the use of the forearm. This and the pain I have spoken of was the result of the accident. In treating the arm and relieving the pain I used the usual remedies. I put the arm at rest and gave analgesics, pain remedies. I did not give him morphine. I did not put him to bed. The absolute rest of the forearm continued about two weeks. He called at my office about four times a week. He could walk around but he suffered pain continually. Later the arm got better but it never recovered its entire function. I have examined him about half an hour ago. I treated his arm until October 24th, that is, about six weeks. He has not yet fully recovered the use of the arm. At the present time the arm has about 50 per cent of its power and about 50 per cent of its motion which is due to a neuritis developed from an injury to the nerves. I cannot tell how long it will be before he will recover the full use of that arm or whether he will ever recover, nor can any one tell at this time. It may be permanent. In my judgment it will be from six months to a year before he gets any more substantial improvement in that arm. * * * * * He was continually in pain during the time I treated him." The jury were warranted in taking the physician's statement as a true description of appellee's injuries and sufferings. And in this view of the matter the amount found by the jury cannot justly be considered as excessive. The judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, ~~CHRISTOPHER XXXXXXXXXXXXXXXX~~ JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 13th day of April in the year of our Lord one thousand nine hundred and twenty one.

Justus L. Johnson

Clerk of the Appellate Court.

6859 6039

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6859 Agenda 9

Rochelle Trust and Savings Bank Executor of the Estate of Margaret Sutphen, Deceased, Appellee, vs. Estate of Charles R. Sutphen, Deceased Appellant.	Appeal from Ogle.

Niehaus J.

The appellee, Rochelle Trust & Savings Bank, as executor of the Estate of Margaret Sutphen, filed a claim against the Estate of Charles R. Sutphen, Deceased. The claim is for board and lodging and for washing, mending and medical attention furnished by Margaret Sutphen, who was the step mother of the deceased. Margaret Sutphen was the second wife of Peter Sutphen, the father of the deceased. The deceased lived with his father and step mother in their home, as a member of the family for a number of years prior to the father's death; and after his father' death, he continued to live there in the same way for about twelve years, until the death of his step mother, which occurred in January 1919. The step mother left surviving her, two children of her own, namely Hattie Johnson, who was appointed administratrix of the Estate of Charles R. Sutphen; and Lenora Sutphen. The administratrix, being a party in interest, the County court appointed W. P. Fearer administrator pro tem to defend the estate against the claim in question. There was a hearing on the claim in the county court and $780.00 was allowed; and thereupon an appeal was taken to the circuit court of Ogle county, where another trial was had, which also resulted in a verdict and judgment for $780.00 in favor of the appellee; from this judgment this appeal is prosecuted.

The proof in this case shows, that the deceased Charles R. Sutphen, during the time that he lived with his step mother,

Gen. No. 5525 Appeals 2

Honolulu Trust and Savings Bank Executor of the Estate of Margaret Stephen, Deceased, Appellee, vs. Estate of Charles R. Stephen, Deceased, Appellant.	Appeal from Ogle.

Matthews, J.

The appellee, Honolulu Trust & Savings Bank, as executor of the Estate of Margaret Stephen, filed a claim against the Estate of Charles R. Stephen, deceased. The claim is for board and lodging and for nursing, washing and medical attention furnished by Margaret Stephen, who was the step mother of the deceased. Margaret Stephen was the second wife of Peter Stephen, the father of the deceased. The deceased lived with his father and step mother in their home, as a member of the family for a number of years prior to the father's death; and after his father's death, he continued to live there in the same way for about twelve years, until the death of his step mother, which occurred in January 1919. The step mother left surviving her, two children of her own, namely Hattie Johnson, who was appointed administratrix of the Estate of Charles R. Stephen; and Lenora Stephen. The administratrix, being a party in interest, the County court appointed T. F. Lacey administrator pro tem to defend the estate against the claim in question. There was a hearing on the claim in the county court and $730.00 was allowed; and therefrom an appeal was taken to the circuit court of Ogle county, where another trial was had, which also resulted in a verdict and judgment for $730.00 in favor of the appellee; from this judgment this appeal is prosecuted.

The proof in this case shows, that the deceased Charles R. Stephen, during the time that he lived with his step mother,

was a member of her family; and that this family relation continued to exist between the parties until the death of the step mother; he received his board and lodging and care and attention like any other member of the family without being required to pay therefor; and he worked in and about the home just like a son would work, who was a member of the family. He did the chores, chopped the wodd, looked after the heating stoves, carried out the ashes, cleaned the walks, and shoveled the snow and ice in the winter time. In the summer time, he mowed the lawn, trimmed the trees, worked in the garden, and took general care of the premises. He also assisted in the washing, when it was done in the home. For his work he did not receive nor apparently expect to receive any compensation, so far as disclosed by the evidence. Under the well settled rule of law, under these circumstances, a claim for board and lodging, and care cannot legally be sustained, unless it appears from the evidence, that there was an express contract between the parties, providing for the payment of such a claim; or that there is evidence, from which a reasonable inference can be drawn, that the deceased expected to pay for the board, lodging and care received, and that the party from whom the deceased received such loding, board and care expected payment to be made for the same. Heffron v. Brown 155 Ill. 332; Switzer v. Kee 146 Ill. 577; Faloon v. McInTyre 118 Ill. 292; Smith v. Birdsall 106 Ill. 264. It is not contended, that there is any evidence of an express contract; but appellee contends, that there is some evidence from which the inference may be reasonably drawn, that the deceased expected to pay for the board and lodging received. The township assessor who was a witness testified, that the deceased during his lifetime, in a conversation, which the assessor had with him concerning a reduction of the assess-

was a member of her family; and that this family relation continued to exist between the parties until the death of the step mother; he received his board and lodging and care and attention like any other member of the family without being required to pay therefor; and he worked in and about the home just like a son would work, who was a member of the family. He did the chores, chopped the wood, looked after the heating stoves, carried out the ashes, cleaned the walks, and shoveled the snow and ice in the winter time. In the summer time, he mowed the lawn, trimmed the trees, worked in the garden, and took general care of the premises. He also assisted in the washing, when it was done in the home. For his work he did not receive nor apparently expect to receive any compensation, so far as disclosed by the evidence. Under the well settled rule of law, under these circumstances, a claim for board and lodging, and care cannot legally be sustained, unless it appears from the evidence, that there was an express contract between the parties, providing for the payment of such a claim; or that there is evidence, from which a reasonable inference can be drawn, that the deceased expected to pay for the board, lodging and care received, and that the party from whom the deceased received such lodging, board and care expected payment to be made for the same. Heffron v. Brown [illegible] 324; Bruner v. Ewe [illegible] 177; Nelson v. Wetherill 118 Ill. 292; Smith v. Birdsall 108 Ill. 364. It is not contended, that there is any evidence of an express contract; but appellee contends, that there is some evidence from which the inference may be reasonably drawn, that the deceased expected to pay for the board and lodging received. The township assessor who was a witness testified, that the deceased during his lifetime, in a conversation, which the assessor had with him concerning a reduction of the assess-

ment of his personal property, said; "that two or three hundred dollars wouldn't pay his board, his taxes and his living expenses;" and that on another occasion, the deceased stated, that the assessor ought to "let him off enough for his board and taxes;" and on a similar occasion, the next year, that he made the remark "the interest wouldn't pay his board and taxes;" also that he made a statement to this effect, that when a certain mortgage which he held, became due "he was going to pay his debts that he owed, and that wouldn't get so much taxes out of him."

If it be conceded, that an inference can be reasonably drawn from these statements, that he expected to pay for his board; it must also be pointed out that the statements referred to do not in any way indicate that the step mother expected to receive any pay for his board. The bare statement alleged to have been made by her that the deceased was not paying any board, can hardly be considered any intimation that she expected him to do so. The record does not disclose any evidence to show that she expected any pay; nor that she received any pay from the deceased during her life time. It is clear therefore, that the proof in this case lacks at least one of the essential elements necessary to sustain a recovery.

The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

ment of his personal property, said; "that two or three hundred dollars wouldn't pay his board, his taxes and his living expenses;" and that on another occasion, the deceased stated, that the assessor ought to "let him off enough for his board and taxes;" and on a similar occasion, the next year, that he made the remark "the interest wouldn't pay his board and taxes;" also that he made a statement to this effect, that when a certain mortgage which he held, became due "he was going to pay his debts that he owed, and that wouldn't get so much taxes out of him."

If it be conceded, that an inference can be reasonably drawn from these statements, that he expected to pay for his board; it must also be pointed out that the statements refuse to do not in any way indicate that the plaintiff expected to receive any pay for his board. The bare statement alleged to have been made by her that the deceased was not paying any board, can hardly be considered any intimation that she exposted him to do so. The record does not disclose any evidence to show that she expected any pay; nor that she received any pay from the deceased during her life time. It is clear therefore, that the proof in this case lacks at least one of the essential elements necessary to sustain a recovery.

The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, ~~CHRISTOPHER C. ADAMS~~ JUSTUS L. JOHNSON Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 13th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson
Clerk of the Appellate Court.

6870 (604a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6870 Agenda 43

Maria M. Gump, Appellee; vs. Illinois Northern Utilities Company, Appellant.	Appeal from Stephenson

Niehaus, J.

This suit was commenced in the circuit court of Stephenson county by the appellee Maria M. Gump against the appellant, Illinois Northern Utilities Company, to recover damages which are claimed, for injuries suffered in a collision by appellant's street car, with a buggy in which the appellee was riding, and based on alleged negligence of appellant's servants in operating the car. It appears from the evidence, that the appellant operates an electric street car line in the city of Freeport, along Stephenson street in that city. The collision in question happened August 31, 1919; the buggy in which the appellee was riding, was drawn by a team of horses; and her husband Henry Gump was driving. The buggy was going along on the south side of Stephenson street in an easterly direction; and near the tracks of appellant's street car line. A street car was coming from the opposite direction propelled towards the west, and in the direction of the buggy and the horses. It is appellee's contention, that the evidence shows, that the horses became frightened by the noise and racket of the a proaching street car; and they thereby became unmanageable and backed the buggy towards the tracks, on which the car was approaching, and that this caused the collision; and that the motorman who operated the street car neglected and failed to exercise the reasonable care the law requires to avoid the collision, after being warned of the danger that appellee was in, on account

Gen. No. 6272 Agenda 12

Maria L. Cuer,

Appellee;

vs.

Illinois Northern Utilities Company,

Appellant.

Appeal from Stephenson

Filed Term, 1.

This suit was commenced in the circuit court of Stephenson county by the appellee Maria L. Cuer against the appellant, Illinois Northern Utilities Company, to recover damages which are claimed, for injuries suffered in a collision by appellant's street car, with a buggy in which the appellee was riding, and based on alleged negligence of appellant's servants in operating the car. It appears from the evidence, that the appellant operates an electric street car line in the city of Freeport, along Stephenson street in that city. The collision in question happened August 21, 1912; the buggy in which the appellee was riding, was drawn by a team of horses; and her husband Henry Cuer was driving. The buggy was going along on the south side of Stephenson street in an easterly direction; and near the tracks of appellant's street car line. A street car was coming from the opposite direction proceeding towards the west, and in the direction of the buggy and the horses. It is appellee's contention, that the evidence shows, that the horses became frightened by the noise and rocket of the a rumbling street car; and they thereby became unmanageable and broke the buggy towards the track, on which the car was approaching, and that this caused the collision; and that the motorman who operated the street car neglected and failed to exercise the reasonable care the law requires to avoid the collision, after

of the frightened horses, and after discovering the danger. There was a trial by jury, which resulted in a verdict and judgment for $3000.00 against the appellant; and this appeal is prosecuted from the judgment.

Two questions are raised on appeal, namely, that the verdict is manifestly against the weight of the evidence; and that reversible error was committed in the giving of the second instruction for the appellee. The instruction is erroneous in informing the jury that it was the duty of the motorman operating the electric car in question, in the exercise of reasonable and ordinary care, in operating, propelling and stopping such car, to not only avoid dangers which were reasonably apparent, but also insofar as it was reasonably possible, to prevent injury to persons travelling upon the public highway. This statement of the motorman's duty of preventing injuries which were reasonably possible, charged the appellant with a higher duty than was required by law. The duty with which the motorman was charged by law was to avoid if he could, the dangers, which are reasonably apparent or might reasonably be expected to occur; and to prevent such injuries as under existing conditions might reasonably be expected to result; but not injuries which are possible or reasonably possible; Bloomington & N. Ry. Co. v. Koss 133 Ill. App. 497; Chicago City Ry. Co. v. Strong 129 Ill. App. 511; Austerlade v. Chicago City Ry. Co. 190 Ill. App. 92. The instruction was therefore misleading, and gave the jury an erroneous idea as to appellant's duty. Inasmuch as the instruction directed a verdict the error must be considered reversible. Baier v. Selke 211 Ill. 510; Chicago City Ry. Co. v. Canevin 72 Ill. App. 81; Krieger v. Aurora E. & C. R. R. Co. 242 Ill. 544.

of the frightened horses, and after discovering the danger. There was a trial by jury, which resulted in a verdict and judgment for $3000.00 against the appellant; and this appeal is prosecuted from the judgment.

Two questions are raised on appeal, namely, that the verdict is manifestly against the weight of the evidence; and that reversible error was committed in the giving of the second instruction for the appellee. The instruction is erroneous in informing the jury that it was the duty of the motorman operating the electric car in question, in the exercise of reasonable and ordinary care, in operating, propelling and stopping such car, to not only avoid dangers which were reasonably apparent, but also insofar as it was reasonably possible, to prevent injury to persons travelling upon the public highway. This statement of the motorman's duty of preventing injuries which were reasonably possible, charged the appellant with a higher duty than was required by law. The duty with which the motorman was charged by law was to avoid if he could, the dangers, which are reasonably apparent or might reasonably be expected to occur; and to prevent such injuries as under existing conditions might reasonably be expected to result; but not injuries which are possible or reasonably possible; Chicagoan v. T. Ry. Co. v. Tuck 114 Ill. App. 497; Chicago City Ry. Co. v. Strong 129 Ill. App. 311; Austerlitz v. Chicago City Ry. Co. 130 Ill. App. 82. The instruction was therefore misleading, and gave the jury an erroneous idea as to appellant's duty. Inasmuch as the instruction directed a verdict the error must be considered reversible. Rater v. Belle 211 Ill. 510; Chicago City Ry. Co. v. Donovan 73 Ill. App. 311; Terrell v. Aurora, E. & R. R. Co. 242 Ill. 544.

The case is reversed for the giving of the instruction referred to; we therefore refrain from a discussion of the evidence. Judgment is reversed and cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 12th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson
Clerk of the Appellate Court.

6590

1605a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on March 17, 1921, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6890 Agenda 31.

Joseph R. Morris, Appellant;	)	
vs.	)	Appeal from Lake
James F. Doyle and G. M. Marks, Appellees.	)	

Niehaus, J.

This is an action of replevin brought by the appellant Joseph R. Morris against James F. Doyle and G. M. Marks, appellees, to recover possession of a mule. The first trial was had in a justice court, and resulted in a judgment in favor of the appellant, from which an appeal was taken to the circuit court of Lake county. In the circuit court another trial was had, and a verdict rendered in favor of the appellant, which however, was set aside by the court. The case was then again tried, but the jury at the second trial, were unable to agree upon a verdict. At a subsequent term the case was again called for trial; and the appellant made a motion for a continuance, which the court denied; thereupon the appellant, made a motion to be allowed to take a non suit, which motion was also denied; and the court proceeded with the trial of the case, without a jury; and having heard the evidence, found the appellees not guilty, and entered a judgment to that effect; also adjudicating the right to the possession of the property in favor of the appellees; also assessing damages for detention of the mule in question in the sum of $750.00; and awarding a writ of retorno habendo. This appeal is prosecuted from the judgment.

It is urged on appeal that the court erred in overruling the motion for continuance of the cause; also erred in deny-

Sup. Ct. 6180 Agenda 21.

Joseph R. Morris, Appellant; vs. James T. Doyle and G. S. Marks, Appellees.	Appeal from Lake

Syllabus, 1.

This is an action of replevin brought by the appellant Joseph R. Morris against James T. Doyle and G. S. Marks, appellees, to recover possession of a mule. The first trial was had in a justice court, and resulted in a judgment in favor of the appellant, from which an appeal was taken to the circuit court of Lake county. In the circuit court another trial was had, and a verdict rendered in favor of the appellant, which however, was set aside by the court. The case was then again tried, but the jury at the second trial, were unable to agree upon a verdict. At a subsequent term the case was again called for trial; and the appellant made a motion for a continuance, which the court denied; thereupon the appellant, made a motion to be allowed to take a non suit, which motion was also denied; and the court proceeded with the trial of the case, without a jury; and having heard the evidence, found the appellees not guilty, and entered a judgment to that effect; also adjudicating the right to the possession of the property in favor of the appellees; also assessing damages for detention of the mule in question in the sum of $750.00; and awarding a writ of returno habendo. This appeal is prosecuted from the judgment.

It is urged on appeal that the court erred in overruling the motion for continuance of the cause; also erred in deny-

ing the motion for a non suit. It will be necessary only to consider the latter question. It is clear, that under the circumstances presented, the appellant should have been allowed to take a non suit, and it was reversible error to deny such right; Stanton v. Linsey 151 Ill. 301; Denton v. Central School Supply House 61 Ill. App. 267; Old Colony Trust & Savings Bank v. Hirtsel 204 Ill. App. 311. The appellee contends that the abstract filed by the appellant is insufficient for the purpose of determination of the matters involved in this appeal; but we are of opinion, that the question decided is sufficiently presented by the abstract. It is also contended, that the Bill of Exceptions was improperly amended, after it had been signed and sealed; it is evidence, however, that the amendment does not effect the matters involved in the point decided.

For the reasons stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

ing the notice for a new suit. It will be necessary only to consider the latter question. It is clear, that under the circumstances presented, the appellant should have been allowed to take a new suit, and if he has recoverable error to that such right; Preston v. Lamar 121 111. 361; Dayton v. Central Branch Supply House 21 Ill. App. 287; Old Colony Trust & Savings Bank v. Hirsel 80 Ill. App. 311. The appellee contends that the statement filed by the appellant is insufficient for the purpose of determination of the matters involved in this appeal; but we are of opinion, that the question raised is sufficiently presented by the statement. It is also contended, that the Bill of Exceptions was improperly signed, after it had been signed and sealed; it is evident, however, that the amendment does not effect the matters involved in the point insisted.

For the reasons stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 13th day of April in the year of our Lord one thousand nine hundred and twenty one

Justus L. Johnson
Clerk of the Appellate Court.

6862

Rehearing
ied June 21, 1921

606a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. OSCAR E. HEARD, Presiding Justice.
Hon. DORRANCE DIBELL, Justice.
Hon. JOHN M. NIEHAUS, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6862. Agenda 48

Alfred E. Anderson, Appellee; vs. Rockford Upholstering Co., Appellant.	)	Appeal from Winnebago.

Niehaus, J.

This is a suit commenced by the appellee, Alfred E. Anderson, in the circuit court of Winnebago county, against the appellant Rockford Upholstering Co., to recover damages which the appellee alleges he suffered on account of a breach of a contract under which he became employed as Secretary and Manager of appellant's business, namely the manufacture and sale of davenport beds in the city of Rockford. It appears from the evidence that in June 1917, the appellee was engaged in a similar line of business, in the city of Minneapolis, Minnesota, and through the medium of a third party, got into communication with appellant, by its directors, and a contract was entered into by which it was agreed, that the appellee should dispose of his business and stock of goods at Minneapolis, and remove to Rockford, and take charge of the plant and business of the appellant; and that if he failed to dispose of all of his stock of goods, such parts as remained on hand, were to be shipped to Rockford, and would be taken and paid for by the appellant at the inventory price. It was further agreed, that the appellee should have a salary of $3000.00 per year, payable semi-monthly; and that fifty shares of the capital stock of appellant of the par value of $5000.00, would be set apart for appellee, to be paid for by him either in cash, or from the earnings of the company; and that appellee was to be an equal stock holder with the other

Gen. No. 8868. Agenda 42

Alfred T. Anderson, Appellee; vs. Rockford Upholstering Co., Appellant.	Appeal from Winnebago.

Hanna, J.

This is a suit commenced by the appellee, Alfred T. Anderson, in the circuit court of Winnebago county, against the appellant Rockford Upholstering Co., to recover damages which the appellee alleges he suffered on account of a breach of a contract under which he became employed as Secretary and Manager of appellant's business, namely the manufacture and sale of davenport beds in the city of Rockford. It appears from the evidence that in June 1917, the appellee was engaged in a similar line of business, in the city of Minneapolis, Minnesota, and through the medium of a third party, got into communication with appellant, by its directors, and a contract was entered into by which it was agreed, that the appellee should dispose of his business and stock of goods at Minneapolis, and remove to Rockford, and take charge of the plant and business of the appellant; and that if he failed to dispose of all of his stock of goods, such parts as remained on hand, were to be shipped to Rockford, and would be taken and paid for by the appellant at the inventory price. It was further agreed, that the appellee should have a salary of $3000.00 per year, payable semi-monthly; and that fifty shares of the capital stock of appellant of the par value of $3000.00 would be set apart for appellee, to be paid for by him either in cash, or from the earnings of the company; and that appellee was to be an equal stock holder with the other

stock holders. After entering into this contract with the appellant, appellee disposed of his business interests at Minneapolis, and moved to Rockford; and shipped to Rockford, his undisposed of stock which was taken by the appellant, and paid for. He took charge of the plant as manager July 10, 1917, and acted in that capacity until February 8, 1919, when he was summarily discharged by the directors of the company and ejected from the plant. He withdrew under protest, claiming, that the directors had no legal right or cause to dismiss him. After his dismissal, according to his testimony, he sought employment elsewhere, but did not succeed in finding other employment until October 1919, when he went to work for the Forest City Photograph Company. The damages claimed by appellee are for the unpaid salary, payable for the balance of the second year, ending July 10, 1919, and amounting to $1250.00; and for the value of the 50 shares of the capital stock, which the appellant under the contract of employment had agreed to set over to him, as his property and which he claimed was appropriated by the appellant and converted to its own use at the time of his dismissal. There was a trial by jury, which resulted in a verdict in favor of the appellee for $6627.50. The court directed a remittitur of $2972.00, which was made, and thereupon the court overruled the motion made by the appellant for a new trial, and rendered judgment on the verdict for the sum of $3655.50. This appeal is prosecuted from the judgment. The appellant claims that it was legally justified in discharging the appellee from his position as Secretary and Manager, for the reason that the appellee had obtained his position by a misrepresentation of his ability, and had failed to keep his contract. It is sufficient to say on this point, that it involves a question of

stock holders. After entering into this contract with the appellant, appellee disposed of his business interests at Minneapolis, and moved to Rockford; and shipped to Rockford, his undisposed of stock which was taken by the appellant, and paid for. He took charge of the plant as manager July 10, 1917, and acted in that capacity until February 8, 1919, when he was summarily discharged by the directors of the company and ejected from the plant. He withdrew under protest, claiming, that the directors had no legal right or cause to dismiss him. After his dismissal, according to his testimony, he sought employment elsewhere, but did not succeed in finding other employment until October 1919, when he went to work for the Forest City Photograph Company. The damages claimed by appellee are for the unpaid salary, payable for the balance of the second year, ending July 10, 1919, and amounting to $1850.00; and for the value of the 50 shares of the capital stock, which the appellant under the contract of employment had agreed to set over to him, as his property and which he claimed was appropriated by the appellant and converted to its own use at the time of his dismissal. There was a trial by jury, which resulted in a verdict in favor of the appellee for $6827.50. The court directed a remittitur of $2972.00, which was made, and thereupon the court overruled the motion made by the appellant for a new trial, and rendered judgment on the verdict for the sum of $3855.50. This appeal is prosecuted from the judgment. The appellant claims that it was legally justified in discharging the appellee from his position as Secretary and Manager, for the reason that the appellee had obtained his position by a misrepresentation of his ability, and had failed to keep his contract. It is sufficient to say on this point, that it involves a question of

fact, which was submitted to the jury under the court's instructions, and was decided by the jury adversely to the appellant; and that the evidence warrants the jury's finding in that regard.

The main contention for reversal of the judgment however, concerns the damages recovered for the 50 shares of capital stock. Appellant claims, that the contract with appellee in reference to the stock of the company, was not a legal or enforcible contract; and that the appellee could not recover damages until after he had offered to pay for the stock, and had made a demand for the same. The appellant owned the shares of stock which it contracted to set apart and transfer to the appellee; but the stock under the contract was to remain in its possession, until paid for, either in cash or by earnings from the business of the company. Appellant was legally competent to sell or dispose of these shares in that way. First N.B. v. P W Co. 191 Ill. 138; Republic Life Ins. Co. v. Swigert 135 Ill. 150; Douglas v. Aurora Daily News Co. 160 Ill. App. 506; Roush v. Ill. Oil Co. 180 Ill. App. 346. Under the contract these shares became the property of appellee, on the condition that they were paid for by the appellee either in cash or by earnings arising from the business which the appellee was to take charge of and manage. The evidence tends to show, that the appellant never set apart this stock to the appellee as it had agreed to do; and at the time the appellant discharged the appellee and forcibly ejected him from its plant, and prevented him from further performing his part of the contract, it took the position, that the appellee was not legally entitled to exact anything more under the contract, which it declared was at an end. This attitude of the appellant made a demand for the stock on the part of the appellee unnecessary; and if discharging appellee was wrong-

fact, which was submitted to the jury under the court's instructions, and was decided by the jury adversely to the appellant; and that the evidence warrants the jury's finding in that regard.

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ful, which the jury found to be the fact, the denial of the appellee's right to the stock based upon such wrongful discharge, and the re-appropriation of the stock to its own use by the appellant on the basis of such discharge amounted to a conversion of it; and the appellee had the legal right to recover damages for such conversion which was also a breach of the contract. It is further contended, that the court committed error in admitting evidence of the financial condition of appellant and of the value of its assets. We think this evidence was competent, as it tended to show the actual value of the stock in question. Meeker v. Chicago Cast. Steel Co. 84 Ill. 276; Farson v. Gilbert 114 Ill.App. 17; Union Nat. Bk. v. Post 64 Ill. App. 404; Cushman v. Hayes, 46 Ill. 145. The point is also made, that the value to be ascertained concerning stock, was market value; and that evidence of actual value was not competent until it appeared that the stock had no market value; and that the appellee did not show upon the trial, that the stock had no ascertainable market value. The proper inference to be drawn from the evidence is, that the stock in question was not for sale in the market; that none of it had been sold, or offered for sale in the market; and that a market value therefore could not be shown; but it is sufficient to say upon this point, that the appellant did not raise this question in the trial court, and cannot therefore raise it for the first time on appeal. People v. Esposito 296 Ill. 535. The proof is clear, that appellee's employment was for a yearly term; his right to recover would therefore be for the balance that remained unpaid for the unexpired term, which he was prevented from serving by the act of the appellant. Hostetler v. Mushrush 194 Ill. App. 58; World's Columbia Ex. v. Richards, 57 Ill. App. 601; Fish v. Glass 54 Ill. App. 655; School Directors v. Orr 88 Ill. App. 648; Brown v. Board of Education

ful, which the jury found to be the fact, the denial of the appellee's right to the stock based upon such wrongful discharge, and the re-appropriation of the stock to its own use by the appellant on the basis of such discharge amounted to a conversion of it; and the appellee had the legal right to recover damages for such conversion which was also a breach of the contract. It is further contended, that the court committed error in admitting evidence of the financial condition of appellant and of the value of its assets. We think this evidence was competent, as it tended to show the actual value of the stock in question. Meeker v. Chicago Cast. Press Co. 4a Ill. 474; Ferson v. Dilbert 1le Ill.App. 17; Union Nat. Bk. v. Post 64 Ill. App. 404; Guenman v. Hayes, 46 Ill. 148. The point is also made, that the value to be ascertained concerning stock, was market value, and that evidence of actual value was not competent until it appeared that the stock had no market value; and that the appellee did not show upon the trial, that the stock had no ascertainable market value. The proper inference to be drawn from the evidence is, that the stock in question was not for sale in the market; that none of it had been sold, or offered for sale in the market; and that a market value therefore could not be shown; but it is sufficient to say upon this point, that the appellant did not raise this question in the trial court, and cannot therefore raise it for the first time on appeal. People v. Esposito 298 Ill. 535. The proof is clear, that appellee's employment was for a yearly term; his right to recover would therefore be for the balance that remained unpaid for the unexpired term, which he was prevented from serving by the act of the appellant. Hoestler v. Muenman 134 Ill. App. 53; World's Columbia Ex. v. Fitzhugh, 57 Ill. App. 601; Tiah v. Glass 54 Ill. App. 555; School Directors v. Orr 83 Ill. App. 643; Brown v. Board of Education

29 Ill. App. 572. And the burden was upon appellant to show that it was entitled to a reduction from the amount thus ascertained, for what he earned or might have earned elsewhere. Fuller v. Little, 64 Ill. 21; School Directors v. Crews 23 Ill. App. 367; and cases last cited.

Error is also assigned concerning the giving of some of the instructions for appellee; and the refusal of several instructions requested by the appellant. It is contended, that Instruction 1, given for the appellee "is manifestly wrong in view of the fact that Plaintiff's Exhibit 51, which included all items of expense in regard to the Minneapolis business, and which plaintiff stated himself was fully settled for." An examination of the instruction does not justify the criticism made, and it clearly appears from the evidence, and the instructions given, that the claims submitted to the consideration of the jury, related only to the shares of stock, and appellee's salary. We find no error in Instruction 2; this instruction being merely a statement of the legal effect of circumstantial evidence, considered in connection with other evidence in the case. Instruction 5 presents to the jury appellee's theory of his right to recover, but does not direct a verdict. It was not necessary to embody in this instruction, the elements of the defense which the appellant claimed to appellee's right to recover, and the jury had the benefit of the law relating to appellant's matters of defense in the instructions which the court gave in its behalf. We find no basis for criticism made on Instruction 6, given for the appellee because it "practically assumes" that appellee's hiring was by the year; the instruction clearly submits that question to the jury.

Appellant contends, that errors were committed in the

39 Ill. App. 572. And the burden was upon appellant to show that it was entitled to a reduction from the annual time assessment, for which he tested on right have annual ele-vator. Tuller v. Little, 54 Ill. App. 61; Pumpel Directors v. Crews 35 Ill. App. 387; and cases last cited.

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Appellant contends, that errors were committed in the

refusal of Instructions 1, 2, 6, 10, 14, 15, 16 and 17. It must be pointed out in reference to this contention, however, that no sufficient or specific reasons are set forth in appellant's brief concerning the errors claimed. We are therefore not required to consider these instructions but may assume that the instructions were properly refused; Hicks v. Waldon, 228 Ill. 56. Moreover the instructions given for the appellant appear to fully embody the law involved in appellant's defense to appellee's claim, and it is stated therein as favorably to the appellant as it was entitled to have it stated. We are of opinion, that the large verdict in this case does not indicate that the jury were actuated by passion or prejudice; and that the remittitur cured the error in that regard. The record does not disclose any error, and the judgment is therefore affirmed.

Judgment affirmed.

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Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, Justus L. Johnson, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 22nd day of June in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson
Clerk of the Appellate Court.